(1)

Supreme Court, U.S.
FILED

No. 97 901 NOV 10 1997

OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM 1997

DAVID L. McLELAND, an individual,

Petitioner,

v.

SYNCOR INTERNATIONAL CORPORATION, a Delaware corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Barry L. Bruce
BARRY L. BRUCE & ASSOCIATES
Post Office Box 388
101 West Randolph Street
Lewisburg, West Virginia 24901
(304) 645-4182

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

15788

QUESTIONS PRESENTED

1. Did the circuit court of appeals incorrectly conclude that the arbitration award was enforceable even though it was the product of an ex parte proceeding?

2. Did the circuit court of appeals improperly approve enforcement by the district court of the ex parte arbitration award even though petitioner strongly protested the arbitrability issue in that proceeding, and no judicial order compelling arbitration was ever entered?

PARTIES TO THE PROCEEDINGS

Petitioner David L. McLeland ("petitioner"), is a former employee of respondent Syncor International Corporation. He worked for Syncor for roughly ten years in various capacities, including a period as a Pharmacy Manager.

Respondent Syncor International Corporation ("respondent"), manufactures and distributes nuclear pharmaceuticals, operates a number of nuclear pharmacies, and also sells related services and products.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 7

1. This case presents a significant and widely debated issue regarding whether an ex parte arbitration award can be enforced when the arbitrator was contractually bound to be chosen by both the parties but in fact only one of the parties participated in the selection process 7

2. This case presents to the Court an undecided issue under the Federal Arbitration Act concerning the question of whether a federal district court can enforce an arbitration award when (a) an individual contests the arbitrability of a dispute prior to the arbitration; (b) the arbitration agreement does not give the arbitrator the authority or the jurisdiction to

decide the arbitrability issue; and (c) the other party conducts an ex parte arbitration without first obtaining an order to arbitrate the dispute 17

CONCLUSION 25

TABLE OF AUTHORITIES

CASES:

Page

AT & T Technologies, Inc. v. Communication Workers of America, 475 U.S. 643 (1986) 17, 18

Darr v. Blevins, 864 F. Supp. 27 (E.D. Mich. 1994) 17

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 17

Fuller v. Pepsi-Cola Bottling Co., 406 S.W.2d 416 (Ky. 1966) 16

General Drivers & Helpers Union, Local No. 554 v. Mid-Continent Bottlers, Inc. (Omaha Division), 767 F.2d 482 (8th Cir.), cert. denied, 474 U.S. 947 (1985) 17

In re Masters, Mates and Pilots,
52 L.R.R.M. 2392 (N.Y. Sup. Ct. 1963) 16

New England Mechanical, Inc. v. Laborers Local Union 294,
909 F.2d 1339 (9th Cir. 1990) 10

Sam Kane Packing Co. v. Amalgamated Meat Cutters,
477 F.2d 1128 (5th Cir.), cert. denied, 414 U.S. 1001 (1973) 15, 16

Sheet Metal Workers International Association, Local No. 33 v. Power City Plumbing & Heating, Inc.,
934 F.2d 557 (4th Cir. 1991) 8, 11

Sheet Metal Workers, Local 162 v. Jason Manufacturing, Inc.,
900 F.2d 1392 (9th Cir. 1990) 10

Toyota of Berkeley v. Automobile Salesmen's Union, Local 1095,
834 F.2d 751 (9th Cir. 1987), cert. denied, 486 U.S. 1043, as amended, 856 F.2d 1772 (1988) 9

United Paperworkers International Union v. Misco, Inc.,
484 U.S. 29 (1987) 21

STATUTES OF THE UNITED STATES:

9 U.S.C. § 4 ..... 20, 22, 23, 24

28 U.S.C. § 1245(1) 2

28 U.S.C. § 2101(c) 2

RULES OF THE SUPREME COURT:

Supreme Court Rule 10 ..... 14, 23

Supreme Court Rule 13 2

OTHER AUTHORITIES:

A.B.C. Cartage & Trucking Co., 42 L.A. 55 (1963, Whelan) 16

Code of Professional Responsibility § V(C)(1), 64 L.A. 1326, 1317 (1975) 13

1 Gabriel M. Wilner, Domke on Commercial Arbitration (Clark Boardman Callaghan rev. ed. 1984 & 1995) 12, 16, 17, 22

F. Elkouri & E. Elkouri, How Arbitration Works (Bureau of National Affairs 4th ed. 1985) . 12, 16, 17

23 James William Moore, Moore's Federal Practice (Matthew Bender 3rd ed. 1997) 14, 23

IN THE
SUPREME COURT OF THE UNITED STATES

SYNCOR INTERNATIONAL CORPORATION,

Respondent,

v.

DAVID L. MCLELAND,

Petitioner.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner David L. McLeland hereby petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The district court's Order (Appendix ["App."]) J, filed on August 19, 1996, denied petitioner's New Trial Motion (App. H). That New Trial Motion was in turn filed in response to the district court's Memorandum Opinion (App. B), and Judgment Order (App. C), filed on March 29, 1996, which had granted respondent's Motion to enforce the final award (App.

G). In an Opinion (App. A), dated August 11, 1997, the United States Court of Appeals for the Fourth Circuit affirmed the district court Order.

JURISDICTION

On appeal from the United States District Court for the Southern District of West Virginia, the United States Court of Appeals for the Fourth Circuit Court of Appeals issued its Opinion (App. A), denying petitioner's appeal; the Opinion is dated August 11, 1997. This petition is accordingly filed within the time allowed by law. Supreme Court Rules 13.1, 13.4. Jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1), 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 9 U.S.C. § 9 provides in pertinent part that:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply with is not in issue, the court shall make an order directing the parties to proceed in accordance with the terms of the agreement . . .

STATEMENT OF THE CASE

Respondent owns and operates a number of nuclear pharmacies across the United States; such pharmacies sell radioactive isotopes for purposes of both diagnosis and therapy. Petitioner was a Syncor employee for more than ten years. His employment was governed by a number of agreements with his employer; among them was a Director/Manager Employment Agreement ("Agreement")(App. K). According to this Agreement, petitioner was to be bound by an Invention, Secrecy & Other Matters Agreement, one of which he had executed in 1990, and a second of which he subsequently executed in 1995. The Agreement in addition contemplated an unexecuted Consulting Agreement Option, under which respondent enjoyed "the irrevocable option" to engage petitioner's services as a consultant.

Under this Agreement, petitioner served first as Midwest Regional Manager with responsibilities for respondent's Huntington, West Virginia office, and from March 18, 1994 until the end of that year as an Operations Analyst For respondent. Pursuant to a letter dated November 28, 1994, however, petitioner was told he was to be terminated "for business reasons" as of December 31, 1994. Petitioner subsequently entered into an Agreement and Release with respondent, which agreement granted petitioner an additional twelve weeks of severance pay in exchange for certain promises granted to respondent under that document. These twelve weeks were in addition to the ten weeks granted to employees in petitioner's position under respondent's normal policy.

Petitioner's departure from respondent's employment was extremely short-lived, however; he was temporarily rehired as a relief pharmacist in the corporation's Memphis, Tennessee

office. Petitioner continued in this position until about March 1, 1995. As a condition for obtaining this temporary position, however, petitioner was required to execute an Arbitration Agreement (App. O). This agreement provided inter alia at App. O-1 as follows:

> In the event (a) Employee disagrees with an Employer decision involving Employee's compensation, position or other conditions of employment or (b) if a dispute arises out of the separation from employment of Employee by Employer then first efforts to resolve the disagreement or dispute shall be according to the problem solving procedure in the Employer's Employee Handbook. If such disagreement or dispute is not resolved by such problem solving procedures, then it shall be resolved by binding arbitration, at the request of either party, In (sic) accordance with the rules of the American Arbitration Association . . . The arbitrator shall have the power to award only actual direct compensatory damages which excludes punitive damages, and the parties waive the right to recover punitive damages . . . The arbitrator shall not have the power to commit errors of law or legal reasoning, and the award may be vacated by judicial review for any such error.

Around the time of petitioner's November 1994 termination, he "became interested in establishing a nuclear pharmacy in the Beckley/Princeton, West Virginia area" (Memorandum Opinion at 2; App. B at B-2). To that end, petitioner entered into discussions in October 1994 about the venture with respondent's executives Wade Hopkins and Jim Stone. Respondent, as a result, was fully aware of petitioner's plans in this direction. The business was in fact incorporated

under West Virginia law on January 31, 1995 as Princeton Diagnostic Isotopes, Inc. ("PDI").

Respondent claims to have learned about the existence of PDI only sometime in February 1995. In fact, this is simply not the case; even the Arbitrator's Final Award Including Factual Findings And The Reasons on Which the Decision is Based ("Final Award")(App. M), reveals that the corporation learned of the plans to create PDI much earlier, i.e., as early as October 1994. In any event, complicated (but fruitless) negotiations were undertaken between the parties to effect a deal under which respondent would have purchased PDI; however, the deal was never consummated and so the dispute was never resolved (Memorandum Opinion at 2; App B. at B-2). See Complaint ¶¶ 15-20, (App D. at D-4 to -5), for some of the alleged details of the so-called negotiations.

Notwithstanding, on March 30, 1995 respondent exercised its option to engage petitioner's services as a consultant (Complaint ¶ 23; App. D at D-6). Accordingly, respondent sent to petitioner a Consulting Agreement (App. L), which, respondent claims, petitioner neither executed nor returned (Complaint ¶ 24; App. D at D-6).

Respondent then demanded arbitration between the parties on May 18, 1995 (Complaint ¶ 27; App. D at D-7). As respondent admitted in its Complaint, however, even before that pleading was filed, "McLeland, through counsel, has denied the validity and applicability of the arbitration agreement, and declined to participate" (Complaint ¶ 28; App. D at D-7). To that extent, the district court finding that "McLeland did not respond" to the demand to arbitrate (Memorandum Opinion at 2; App. B at B-2), obviously tells much less than the full story. Notwithstanding, the American Arbitration Association

("AAA"), sent the parties a letter dated May 23, 1995 ("AAA Letter")(App. P), setting out the facts of the arbitration demand and the details of the proposed arbitration. Among its provisions, was a paragraph setting out the manner of choosing an arbitrator (AAA Letter ¶ 4; App. P at P-2). The parties were presented with a list of arbitrators, from which each could strike up to three names. If the process failed to produce a mutually acceptable arbitrator, then "the AAA will proceed to an administrative appointment of the arbitrator" (AAA Letter ¶ 4; App. P at P-2). The point, in any event, is that both parties were jointly to select the arbitrator even though, because petitioner did not participate in the arbitration proceeding in any fashion, he did not help to choose the arbitrator in fact. It is therefore believed that respondent rather then the AAA chose the arbitrator. The AAA subsequently issued a notice to the parties on July 12, 1995 which set an arbitration hearing date of August 21, 1995 (Final Award at 1; App. M at M-1).

On August 2, 1995, however, respondent filed its Complaint and Petition to Compel Arbitration (App. D); this pleading was obviously filed before the arbitration was scheduled to be heard. Petitioner's answer to the Complaint was scheduled to be filed on or before August 23, 1995; his Answer and Counterclaim (App. E), which was dated August 21, 1995, was therefore timely filed in the trial court on August 23, 1995. In this Answer and Counterclaim, petitioner specifically "denie[d] the validity and applicability of arbitration to the facts of this matter" (Answer and Counterclaim ¶ 28; App E. at E-4), a denial which was an effective contention, made before the actual arbitration and within a judicial context, that the dispute was not arbitrable.

Notwithstanding, the arbitration took place on August 21, 1994. See Final Award (App. M). It was held without

McLeland's participation (Final Award at 1; App. M at M-1); hence, the arbitration proceeded ex parte (Memorandum Order at 2; App. B at B-2). A Final Award (including an Award of relief), was then, of course, issued on September 29, 1995 (Final Award at 1; App. M at M-1; Memorandum Order at 2; App B. at B-2).

Respondent then filed its Complaint and Petition to Compel Arbitration (App D.). Petitioner, in response, filed his answer and counterclaim on August 23, 1995 (App. E). Respondent filed its answer to the counterclaim and its own counterclaim on September 21, 1995 (App. F). Petitioner in turn filed his answer to the respondent's counterclaim on October 3, 1995 (App. G). Respondent thereupon filed its Motion to Enforce Arbitrator's Final Award ("Motion")(App. H), on October 17, 1995. After a hearing on the Motion on March 12, 1996, the trial judge filed its Memorandum Opinion (App. B), and Judgment Order (App. C), on March 29, 1996, granting the Motion to enforce the final award.

On April 8, 1996, Petitioner moved for a new trial and to set aside the Judgment (App. I). The trial court filed an Order (App. J), on August 19, 1996; inter alia, the Order denied the motion for a new trial. Petitioner thereupon filed his notice of appeal on September 13, 1996. After an exchange of briefs and oral argument, the Fourth Circuit Court of Appeals affirmed the district court disposition of the case (App. A). Petitioner now submits this Petition in response to that appellate action.

REASONS FOR GRANTING THE PETITION

1. **This case presents a significant and widely debated issue as to whether an ex parte arbitration award can be**

enforced when the arbitrator was contractually bound to be chosen by both the parties but in fact only one of the parties participated in the selection process. As all parties agree, the Arbitration Award in this case was clearly the product of an ex parte proceeding (Opinion at 5; App. A at A-5), a fact as to which petitioner has strenuously objected at every stage of this dispute. Both the circuit court of appeals and the district court were untroubled by this fact because, or so the district judge found, AAA "rules provide for an arbitration hearing to proceed ex parte, if a party who has received proper notice does not participate in the hearing" (Memorandum Opinion at 5-6; App. B at B-5). The circuit court of appeals quoted this language and concluded that "[t]his conclusion is correct" (Opinion at 5; App. A at A-6). The appellate court then cited and quoted the decision in Sheet Metal Workers International Association Local Union v. Power City Plumbing & Heating, Inc., 934 F.2d 557, 561 (4th Cir. 1991), for the proposition that "if the opposing party was served with proper notice and was aware of the arbitration proceedings, "[t]he arbitration award is valid and fully enforceable despite [that party's] absence'" (Opinion at 6; App. A at A-7).

Power City does not speak to the issue at hand, however, because, from bare words of the opinion, it appears that the arbitration in that decision was of a type, as characterized by the circuit court of appeals in this case, in which "the arbitrator is either pre-selected or joint selection is not necessary" (Opinion at 6; App. A. at A-7). The present case, by contrast, is of a type, again in the words of circuit court of appeal, in which "the arbitrator is to be jointly selected by the parties" (id.; App. A. at A-7).

What, then, if there is no joint selection at all, i.e., what happens if, as in the case at hand, the parties to the dispute do not jointly take part in the selection process as the arbitration agreement seems to contemplate? In that regard, the court of

appeals noted the AAA rules providing that "[u]nless the law provides to the contrary, the arbitration may proceed in the absence of any party . . . who, after due notice, fails to be present" (AAA, Employment Dispute Resolution Rules, Rule No. 18 (effective November 1, 1993))(App. T)(emphasis supplied)("AAA Rules"). However, as Petitioner pointed out in the court below, under the Arbitration Agreement into which the parties entered, the law does "provide[] to the contrary"; hence, he argued, the ex parte arbitration hearing was improper and could not have served as the valid basis for an Order and Judgment enforcing the Final Award, let alone for its approval by the appellate court on appeal.

As noted above, the Arbitration Agreement stipulated the applicability of "the rules of the American Arbitration Association" (App. O). These rules in turn provide in App. T at T-1, as follows:

> [T]he AAA shall send simultaneously to each party to the dispute an identical list of names of persons chosen from the panel . . .Each party to the dispute shall have 10 days from the transmittal date in which to strike any names objected to, number the remaining names in order of preference, and return the list to the AAA . . . If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite that acceptance of an arbitrator to serve.

Under Petitioner's view, the proper analysis of this procedure in cases where one of the parties does not participate in the selection process is found in Toyota of Berkeley v. Automobile Salesmen's Union, Local 1095, 834 F.2d 751, 754

(9th Cir. 1987), cert. denied, 486 U.S. 1043, as amended, 856 F.2d 1772 (9th Cir. 1988), as follows:

> [T]he general trend of authority is clear. Under a collective bargaining agreement specifically providing for designation of an arbitrator without the participation of both parties, an arbitrator may issue an enforceable default award when one party fails to attend the hearing. If an agreement provides that the parties shall jointly select an arbitrator, however, a court may refuse to enforce an award made following an ex parte hearing before an arbitrator selected without the defaulting party's cooperation, on the grounds that the party not in default should have sued to compel arbitration.

(Citations omitted)(emphasis supplied).

The present situation obviously fits comfortably within Toyota of Berkeley's second class, i.e., one in which a joint selection process is mandated. The arbitrator was to be chosen through the joint efforts of petitioner and respondent, in contrast to alternative procedure in which the arbitrator is typically chosen without such joint efforts. Cf. New England Mechanical, Inc. v. Laborers Local Union 294, 909 F.2d 1339, 1346 n. 5 (9th Cir. 1990)("Ex parte arbitration is allowed when the parties have agreed to designate an arbitrator in advance of any dispute"); Sheet Metal Workers, Local 162 v. Jason Manufacturing, Inc., 900 F.2d 1392, 1398 (9th Cir. 1990) (same; citing Toyota of Berkeley). Under those conditions, the circuit court of appeals should have refused to approve the district court's enforcement of the Final Award but should

instead have continued its adjudication of the Complaint to compel arbitration.[1]

In their refusal to condemn the ex parte nature of the Final Award, neither court below analyzed the matter in the depth it deserved. As noted above, the circuit court of appeals simply relied on the statement in Sheet Metal Workers International Association, Local No. 33 v. Power City Plumbing & Heating, Inc., supra, 934 F.2d at 561, that, assuming the existence of notice and knowledge, an ex parte arbitration is enforceable. The problem with this analysis is that there is nothing whatever in the Power City decision that reveals whether that case fell within the first or second of the two Toyota of Berkeley classes. As a result, it is impossibleto tell if Power City is relevant to this case or not.[2]

Under the circumstances, petitioner urges the Court to follow "the general trend of authority," Toyota of Berkeley v. Automobile Salesmen's Union, Local 1095, supra, 834 F.2d at 754, and find that the court of appeals should have disapproved the district court's decision not to adjudicate the Complaint to compel arbitration to final judgment but instead to grant respondent's motion to enforce the Final Award.

The circuit court of appeals dealt with Toyota of Berkeley by purporting not to "express[] any opinion on the merits of the Ninth Circuit's rule" (Opinion at 6; App. A at A-7). Instead it offered three reasons why, in its view, Toyota of Berkeley did not apply at all. Petitioner submits that the Court

---

[1] The very fact that respondent filed its complaint to compel arbitration some weeks before the arbitration was actually held suggests that the corporation was well aware of the rules in this regard.

[2] Of course, if Powers City is relevant, petitioner's view is simply that both that decision and the more recent disposition of the case at hand by the fourth circuit, are equally wrong.

should find all of these reasons unconvincing, and conclude instead that this case fits squarely within the Toyota of Berkeley paradigm.

First, the court asserted that "AAA rules provide only for joint input, not joint selection" (Opinion at 7; App. A at A-8). In Petitioner's view, however, this takes an unduly blinkered view of the selection process. The record in this case is silent as to how many names were actually submitted to the parties as candidate-arbitrators. However, each party had the right to disapprove of certain names, as well as to list the remaining names in order of preference; thus, the "joint input" in this case could clearly be a first cousin of "joint selection" at the very least. In any case, it is the right of participation in the "joint selection" process (as opposed to situations in which the parties are simply presented with their arbitrator with no right of selection input whatever), which triggers the Toyota of Berkeley test. The present case is, in short, clearly a case in which "the parties shall jointly select an arbitrator." Toyota of Berkeley v. Automobile Salesmen's Union, Local 1095, supra, 834 F.2d at 754. See generally, F. Elkouri & E. Elkouri, How Arbitration Works 245-46 (Bureau of National Affairs 4th ed. 1985 & Supp. 1988)("Elkouri"); 1 Gabriel M. Wilner, Domke on Commercial Arbitration, § 20.02 at 308 (Clark Boardman Callaghan rev. ed. 1984)("Domke"). As a result, an ex parte resolution of the case was improper.

Second, the circuit court of appeals suggested that the fact the arbitration can proceed if even if "a party does not return the list within the time specified" (AAA Rules 18; App. T at T-1), serves as a rule-based provision for ex parte arbitrations (Opinion at 7; App. A. at A-8). In fact, the selection provisions in the rule do nothing of the sort. All that the so-called "default" selection process provides is that the arbitrator can be named even if a party does not particulate in that process. That is, if the parties fail to return their lists in a timely

fashion, then, assuming all parties appear at the hearing, the arbitration proceedings can take place with the "default" arbitrator so chosen. The rule cannot be stretched so far as to entail that an actual ex parte arbitration can then take place merely because the lists were not returned. Indeed, under the rationale of the circuit court of appeals, if neither party submitted its list or even showed up at the arbitration hearing, the arbitrator could then conduct an arbitration in the absence of both parties. Merely to state such a proposition is clearly sufficient to refute it. The proper analysis factors in the proviso in the AAA rules authorizing ex parte hearings "[u]nless the law provides to the contrary" (AAA Rules 18; App. T at T-1).[3]

Here, as Toyota of Berkeley plainly entails, the law is "to the contrary." Hence, prosecution in the district court of the action to compel arbitration was the proper--and only--road this dispute should have taken.

Third, the court of appeals suggests that Petitioner's objection is not with the ex parte nature of the arbitration but with the "arbitrator that was actually selected" (Opinion at 7; App. A. at A-8). As the court framed this analysis:

> McLeland's objection more properly concerns the arbitrator that was actually selected; insofar as he complains about being deprived of his strikes, the issue is whether the arbitrator who conducted the arbitration

---

[3] Of equal relevance is the arbitration Code of Professional Responsibility, which provides inter alia as follows:

1. In determining whether to conduct an ex parte hearing, an arbitrator must consider relevant legal, contractual, and other pertinent circumstances.

Id. § V(C)(1), 64 L.A. 1317, 1326 (1975).

> was biased, McLeland has made no such claim, however, and has never objected to the choice of arbitrator. By his own admission he not prejudiced by his failure to participate in the selection of the arbitrator.

(Opinion at 7; App. A. at A-8 to -9). This rationale for the decision below constitutes question-begging on a wholesale scale. It is equivalent to saying that if a citizen is illegally denied the vote, the denial is unimportant so long as the candidate the voter favored was actually elected. Needless to say, petitioner disagrees with the results of the arbitration; by parity of logic, he objects to the identity of the arbitrator who was chosen to arbitrate the dispute. But this objection is hardly inconsistent with Petitioner's parallel--and more relevant--objection, in light of the selection process, to the holding of any ex parte arbitration at all, regardless of the identity of the arbitrator actually chosen, and notwithstanding the actual outcome of the proceedings. In short, therefore, the circuit court of appeals' justification of not reaching a result consistent with the reasoning in Toyota of Berkeley is notably unconvincing, and justifies a grant of the writ here sought.

It is settled that a writ of certiorari can issue from this Court to resolve conflicts among the federal circuit courts of appeals on questions of importance to the body of federal jurisprudence. See Supreme Court Rule 10(a); Calhoon v. Harvey, 379 U.S. 134, 137 (1964)("Because of the importance of the question presented and conflicting views in the courts of appeals and the district courts, we granted certiorari"); 23 James William Moore, Moore's Federal Practice § 510.21 at 510-14 (Matthew Bender 3rd ed. 1997). Petitioner has alleged and documented just such a conflict between the ninth (Toyota of Berkeley), and fourth circuits (the case at hand), on the important issue of when, under both the rules of the AAA and federal arbitration law, ex parte arbitrations are proper and their results enforceable. But the inter-circuit conflict is not confined to

these two circuits; the fifth circuit also follows a rule which, although it arose under somewhat different facts, is consistent with that of the ninth circuit, and at odds with the one that is the subject of the Petition at hand. For that reason, the justification for issuance of the Writ becomes, in Petitioner's view, even more compelling.

The case of Sam Kane Packing Co. v. Amalgamated Meat Cutters, 477 F.2d 1128, 1136 (5th Cir.) cert. denied, 414 U.S. 1001 (1973), also involved a situation in which one of the parties declined to participate in either the arbitrator selection process or in the ultimate arbitration itself. The company "consistently took the position that the dispute in this case was not arbitrable under the contract." 477 F.2d at 1135. An attorney for the company was in fact one of the arbitrators named; the union nominated a second member of the panel and those two members were to chose a "neutral" third member, who would, under the realities of the situation, be the tie-breaker. The company refused to take part in the selection process, whereupon a single party arbitration--conducted by the union-chosen arbitrator--was held. Naturally, the union position was adopted, and the district court then enforced the award.

The fifth circuit disapproved on the ground that ex parte arbitration represented a "harsh policy" that was inappropriate under the circumstances. Id. at 1136. It is true that the court so held because the matter involved the choice of a third panel member, not the selection of the initial members thereof. Indeed, the court went so far as to state that if the company had refused to name any arbitrator at all, or if the union had simply picked a name off the list of neutrals, an ex parte proceeding might have been enforceable. Id. & n. 3 (dictum).

The point of this analysis is that the "harsh penalty" of ex parte dispute resolution should be implemented only if the

object of the remedy has failed to take substantial steps with respect to the arbitration--either by way of participation or in seeking to forestall it. In the present case, it is clear that petitioner took many steps to deal with the immanency of the arbitration proceedings by participating fully in the action filed by respondent to compel arbitration. As such, Petitioner's actions are functionally identical to the act of the company in Sam Kane in first naming its own arbitrator but in then declining to participate in the completion of the panel, and then in the actual arbitration itself.[4]

The court in Sam Kane therefore held that, under the circumstances, "the union should have sought an order from the district court compelling the company to follow the contractually agreed-to procedures." See generally, Elkouri, supra at 247-48; 1 Domke § 18.01 at 18-3 (Clark Boardman Callaghan rev. ed. 1995).

This is, needless to say, precisely what respondent did quite early in this dispute, only to opt instead for the ex parte arbitration route as the actual date of the arbitration drew nigh. Petitioner suggests that the respondent's first instincts were correct; it should have continued pursuing that remedy. As this

---

[4] Although the focus in the Petition is upon the split among the fourth, fifth, and ninth circuits, one notes that, under circumstances similar to those in Sam Kane or Toyota of Berkeley, a number of state courts have declined to enforce ex parte awards on the ground that the participating party should have sought an order compelling arbitration in state court. See, e.g., Fuller v. Pepsi-Cola Bottling Co., 406 S.W.2d 416, 4`8 (Ky. 1996); In re Masters, Mates and Pilots, 52 L.R.R.M. 2392 (N.Y. Sup. Ct. 1963). Cf. A.B.C. Cartage & Trucking Co., 42 L.A. 55 (1963, Whelan)(arbitrator refused to proceed with ex parte arbitration absent clear direction to the contrary under state law or AAA rules).

Court has noted, it is a "first principle . . . that 'arbitration is a matter of contract[.]'" AT & T Technologies, Inc. v. Communication Workers of America, 475 U.S. 643, 648 (1986), quoting Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). See also First Options of Chicago, Inc. v. Kaplan, 514 U.S. 944 (1995)(same). See generally, Elkouri, supra at 247-48; 1 Domke § 5.00 at 47 (Clark Boardman Callaghan rev. ed. 1984). Under the contract between the parties (which incorporates the AAA rules; see generally, 1 Domke § 7.01 at 81 (Clark Boardman Callaghan rev. ed. 1984)), petitioner's refusal to take part in the selection process, should under prevailing law have limited respondent to its legal remedy, if any, to compel arbitration. Because the court of appeals, contrary to better considered authority from the fifth and ninth circuits, held to the contrary, petitioner submits that a writ of certiorari to that court to resolve this important issue of arbitration law is appropriate.

2. **This case presents to the Court an undecided issue under the Federal Arbitration Act concerning the question of whether a federal district court can enforce an arbitration award when (a) an individual contests the arbitrability of a dispute prior to the arbitration; (b) the arbitration agreement does not give the arbitrator the authority or the jurisdiction to decide the arbitrability issue; and (c) the other party conducts an ex parte arbitration without first obtaining an order to arbitrate the dispute.** It is a black letter principle of arbitration law that whether a particular dispute is arbitrable or not is a legal question for the court. AT & T Technologies, Inc. v. Communication Workers of America, supra, 475 U.S. at 649. What this principle means is that arbitrability is most commonly a question of law for the court. General Drivers & Helpers Union, Local No. 554 v. Mid-Continent Bottlers, Inc. (Omaha Division), 767 F.2d 482, 484 (8th Cir.)("A party's assent to arbitration, as a matter of contract

construction, is a question of law for the court"), cert. denied, 474 U.S. 947 (1985); Darr v. Blevins, 864 F. Supp. 27, 29 (E.D. Mich. 1994)("[I]t is a matter of law for the Court to interpret the provisions of the arbitration agreement and determine the scope of claims submissible to arbitration").

The Arbitration Agreement says nothing whatever about the arbitrability of the question of whether the actual dispute decided by the arbitrator was, in fact, arbitrable. It is true that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakab[e] evidence that they did so.'" First Options of Chicago, Inc. v. Kaplan, supra, 514 U.S. at 944, quoting AT & T Technologies, Inc. v. Communication Workers of America, supra, 475 U.S. at 649. The test to be applied flows from "ordinary state-law principles that govern the formation of contracts." First Options of Chicago, Inc. v. Kaplan, supra, 514 U.S. at 944. As the Court noted in this regard, the inquiry is "whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration." Id. An examination of the present Arbitration Agreement reveals no "'clea[r] and unmistakab[e] evidence,'" id., whatever on the point in either direction. The question thus became one of law for the court below to determine.

Silence on the issue, however, gives rise to an presumption in favor of the exclusivity of judicial disposition of the arbitrability question, as the Court took pains to point out in its decision in Kaplan:

> [T]he law treats silence or ambiguity about the question "who (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement" --for in respect to this latter question the law reverses the presumption.

First Options of Chicago, Inc. v. Kaplan, supra, 514 U.S. at 944-945 (emphasis by the Court).

Although the Arbitration Agreement was silent on the issue, petitioner most certainly was not; he put the issue into play in his Answer over a month before the Final Award was even issued. In addition, respondent had been informed before it ever filed its Complaint to compel arbitration that petitioner objected to the undertaking in the strongest possible terms (Complaint ¶ 28; App. D at D-7). See also the June 7, 1995 letter from petitioner's counsel to the AAA (App. S at S-1)("On behalf of David McLeland, we do not submit to arbitration and have not agreed to arbitration"), which also made the point in the strongest terms. What is more, the issue was also implicitly put into controversy by respondent in its filing of a Complaint to compel arbitration, which was filed almost a month before the arbitration hearing was held. As a result, the district court's statement that petitioner "never raised this issue with the court" (Memorandum Opinion at 7 n. 2; App. B at B-6)--an assertion with which the circuit court of appeals necessarily had to agree in order to affirm the lower court's disposition of the case--simply does not square with the procedural or factual history of this litigation.

Because he objected to the arbitrability of the dispute, petitioner was then faced with the problem of what to do about it. Given the near certainty that the Arbitration Agreement did not provide for resolution of the arbitrability question by the arbitrator himself, petitioner was faced with a number of unpleasant, and probably unavailing, possibilities. The Court in Kaplan acknowledged and sketched two of those possibilities:

> 1 First Options makes several counterarguments: (1) that the Kaplans had other ways to get an independent court decision on the question of arbitrability without arguing the issue to the arbitrators (e.g., by

> trying to enjoin the arbitration, or by refusing to participate in the arbitration and then defending against a court petition First Options would have brought to compel arbitration.

514 U.S. at 946. In the event, petitioner did refuse to participate, and respondent did seek to compel arbitration, as was its right under the Federal Arbitration Act, 9 U.S.C. § 4.[5]

Up to this point, the case at hand had faithfully followed the Kaplan script; the prospect was that the Complaint and Petition to Compel Arbitration (App. D), would be adjudicated, its outcome the product of a judicial consideration of the merits of each party's arguments on the arbitrability issue. In fact, however, the Kaplan script was abandoned because the arbitration was held ex parte notwithstanding the fact that this complaint to compel arbitration was still pending when the arbitration was held and the Final Award issued.

---

[5] The question of whether the parties had agreed to arbitrate arbitrability was, as a result, effectively still before the court and undecided when the district judge addressed the motion seeking to enforce the Final Award. Petitioner had therefore been justified in not participating in the arbitration because this issue of law for the court had never been addressed by the trial judge before the arbitration took place. Because it was not decided at that time, it surely should have been addressed before the Final Award itself was enforced, as the Kaplan case plainly requires. The decision below is fundamentally flawed, therefore, because the threshold legal question of whether the parties had agreed to arbitrate arbitrability remains undecided to this day. That alone should have been sufficient to dictate a reversal of the district court on appeal; that it did not requires a disapproval of the failure by the circuit court of appeals to do so itself.

The present case therefore involved a possibility with which the Court was not concerned in Kaplan. What if, as was the case in both Kaplan and the present litigation, it "cannot [be] show[n] that the [parties] clearly agreed to have the arbitrators decide . . . the question of arbitrability," 514 U.S. at 946, but, as is the case here but was not in Kaplan, the arbitration is held notwithstanding one party's refusal to participate--which decidedly was not the case in Kaplan but was petitioner's course of action in the case at hand. Under such circumstances, petitioner was forced to roll the dice; he could either participate in the arbitration, which act would violate his contention that the dispute was not arbitrable and lead to all sorts of tactical and strategic difficulties in the process. Or petitioner could refuse to participate at all, thereby chancing an unfavorable ex parte award which, given the extraordinarily limited scope of judicial review of such awards, see First Options of Chicago, Inc. v. Kaplan, supra, 514 U.S. at 942 ("the court will set that decision aside only in very unusual circumstances"); United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 36-37 (1987); AT & T Technologies, Inc. v. Communication Workers of America, supra, 475 U.S. at 649-650, would force him in turn to run the risk of losing the war simply through the loss of a preliminary skirmish. Particularly where "there is no strong arbitration-related policy favoring" the arbitrability of the arbitrability question, First Options of Chicago, Inc. v. Kaplan, supra, 514 U.S. at 947, neither Kaplan nor federal arbitration law can be said to demand that he run that risk.

One would expect respondent at this point to observe that petitioner could, under the circumstances, have filed for an injunction to stay the arbitration. In fact, however, the legal deck was heavily stacked against any such attempt. In the first place, the Federal Arbitration Act does not place the burden of seeking a stay of an arbitration on the party contesting an

arbitration. In fact, the Act does not even provide a mechanism for such a contest. By contrast, the Act explicitly provides a statutory vehicle for the party seeking to compel arbitration. See 9 U.S.C. § 4. Thus, the statutory scheme that constitutes the playing field in this matter is seen to be heavily tilted in respondent's favor. Such a structural bias, petitioner contends, is neither demanded by, nor justified under, settled principles of federal arbitration law.

This is not to say that petitioner could not have sought such relief nonetheless. Yet, and in the second place, as a leading commentator observes, "[s]tays of arbitration pending appeal are exceptionally hard to get, making casual or reflexive requests presumptively grounds for sanctions." 1 Domke, supra, § 18.07 at 18-19 (Clark Boardman Callaghan rev. ed. 1995). This means that a party in respondent's position is free either to seek to compel arbitration or simply to go ahead with the arbitration. The worst that could happen to it is a judicial finding that the dispute was not arbitrable, whereupon the parties would simply return to square one. From petitioner's point of view, however, his best possible result is respondent's worst result, i.e., a finding that the dispute was not arbitrable. His worst result would be an unfavorable ex parte award to whose creation he would not have contributed, and which, given the ex parte nature of the process that created it, was likely to be unfavorable.

The logic of this argument can be viewed from another perspective. Whether or not the arbitrator has the contractually-granted power to arbitrate the question of arbitrability, it is clear as a practical matter that he must decide the arbitrability question (if it is raised by one of the parties) at least implicitly, or not conduct the arbitration at all. Yet the Court in the Kaplan case made it clear that when the parties have not agreed to arbitrate the arbitrability issue, the law reverses the presumption that normally operates in favor of arbitration to a presump-

tion against the arbitrability of the arbitrability question. 514 U.S. at 944-945. However, if a party is allowed to circumvent the necessity of compelling arbitration under 9 U.S.C. § 4 by holding an ex parte arbitration instead, then in practical terms at least, he has been able to reverse the presumption as to the arbitrability of the arbitrability question which the Court had formally resolved against him in Kaplan.

That is, the Court decided in Kaplan that for an arbitrator to have authority to decide the arbitrability issue, he must draw that authority from the contract itself, employing "ordinary state-law principles that govern the formation of contracts." 514 U.S. at 944. Thus, the Arbitration Agreement would have had unmistakenly to grant him that authority for the arbitrator explicitly to be authorized to decide that issue. Id. In the instant case the Arbitration Agreement was drafted by respondent and does not address the arbitrability issue at all. But by being able to hold an ex parte arbitration absent "'clea[r] and unmistakabl[e] evidence,'" id., giving the arbitrator the power to decide the arbitrability issue, respondent has benefitted as if the presumption did favor him.

The effect of the decision below therefore frustrates the Court's goals in Kaplan. This fact entails in turn that the Court should, in line with the considerations set out in Supreme Court Rule 10(c), grant certiorari in this case to deal with this issue as one left open (but needing resolution) on account of the differing facts in issue in Kaplan. See generally, 23 Moore's Federal Practice § 510.41 at 510-27, § 510.44 at 510-39. This Court has not dealt with the issue of whether, when an arbitration agreement is silent on the issue of "the 'who' question," 514 U.S. at 943, but one of the parties to the contract asserts the non-arbitrability of the dispute, the party seeking arbitration is free to bypass the need to file suit to compel arbitration, and simply hold an ex parte proceeding. The question is important to the body of arbitral jurisprudence because judicial approval

of the procedures actually taken in this case would upset the balance of presumptions so carefully crafted in Kaplan. In addition, the process followed in this case allows a party like respondent to avoid as well carrying the burden, clearly placed on parties seeking to invoke the procedure, of demonstrating the propriety of convening an arbitration in the first place.

The better rule in the wake of Kaplan demands that the arbitrator not convene an ex parte arbitration unless the arbitration is the product of a 9 U.S.C. § 4 order to compel arbitration which the other party then proceeds to ignore. Any contrary procedure is violative of basic principles of arbitral law, as set out in the Act and as announced by this Court. Petitioner urges the Court to take this next step after Kaplan and grant his Petition for a Writ of Certiorari to the Fourth Circuit Court of Appeals. The importance of this issue to the proper and equitable functioning of the federal arbitration system demands no less.

CONCLUSION

Therefore, and for all the foregoing reasons, petitioner David L. McLeland respectfully requests that this Court issue a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Respectfully submitted,

DAVID L. MCLELAND

By Counsel

Barry L. Bruce
Barry L. Bruce and Associates
Post Office Box 388
101 West Randolph Street
Lewisburg, West Virginia 24901
Telephone: (304) 645-4182
Attorney for Petitioner

APPENDIX

TABLE OF CONTENTS

Appendix A

Opinion from the United States Court of Appeals for the Fourth Circuit, dated 8/11/97

Appendix B

Memorandum Opinion from the United States District Court for the Southern District of West Virginia, dated 3/29/96

Appendix C

Judgment Order from the United States District Court for the Southern District of West Virginia, dated 3/29/96

Appendix D

Syncor's Complaint and Petition to Compel Arbitration, dated 8/2/95

Appendix E

McLeland's Answer and Counter Complaint, dated 8/23/95

Appendix F

Syncor's Answer and Counterclaim of Syncor International Corporation to the Counter Complaint, dated 9/21/95

Appendix G

McLeland's Answer to the Counterclaim, dated 10/3/95

Appendix H

Syncor's Motion to Enforce Arbitrator's Final Award and Dismiss This Action, dated 10/17/95

Appendix I

McLeland's Motion for a New Trial pursuant to Rule 59 of Federal Rules and Procedures and Motion to Set Aside Judgment pursuant to Rule 60(b) of Federal Rules of Civil Procedure, filed 4/8/96

Appendix J

Order from the United States District Court for the Southern District of West Virginia, dated 8/19/96

Appendix K

Director/Manager Employment Agreement

Appendix L

Consulting Agreement

Appendix M

Arbitrator's Final Award Including Factual Findings and the Reason on which the Decision is Based, dated 9/29/95

Appendix N

Ex Parte Award of Arbitrator

Appendix O

Arbitration Agreement

Appendix P

Letter from the American Arbitration Association, dated 5/23/95

Appendix Q

Invention, Secrecy & Other Matters Agreement

Appendix R

Agreement and Release

Appendix S

Letter of June 7, 1995 from Robert E. Holroyd to John F. Schano

Appendix T

Excerpts from American Arbitration Association Employment Dispute Resolution Rules as amended and effective 11/1/93

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

SYNCOR INTERNATIONAL CORPORATION,
a Delaware corporation,

Plaintiff-Appellee,

v.

No. 96-2261

DAVID L. MCLELAND, an individual,

Defendant-Appellant,

JEFFREY CLANTON,

Party-in-interest.

Appeal from the United States District Court
for the Southern District of West Virginia, at Bluefield.
David L. Faber, District Judge.
(CA-95-565-1)

Argued: June 4, 1997

Decided: August 11, 1997

Before WILLIAMS and MICHAEL, Circuit Judges, and
BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

APPENDIX A

COUNSEL

ARGUED: Barry Lee Bruce, BARRY L. BRUCE & ASSOCIATES, Lewisburg, West Virginia, for Appellant. Benjamin Lee Bailey, BOWLES, RICE, MCDAVID, GRAFF & LOVE, Charleston, West Virginia, for Appellee. **ON BRIEF:** Ronda L. Harvey, BOWLES, RICE, MCDAVID, GRAFF & LOVE, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

David L. McLeland appeals the district court's order granting the motion of Syncor International Corporation (Syncor) to enforce the final award resulting from an ex parte arbitration proceeding. McLeland claims that the arbitration award should not have been enforced because the arbitration proceeding was conducted ex parte and because the dispute was beyond the scope of the arbitration agreement between the parties. In addition, McLeland argues that the district court reviewed the arbitrator's award under an incorrect standard. Finding no error, we affirm.

I.

Syncor compounds and distributes nuclear pharmaceuticals, owns and operates nuclear pharmacies, and sells related products and services. McLeland began his employment with Syncor in the mid-1980s. Although he left Syncor for a brief

period in the late 1980s, McLeland continued to work for Syncor in various capacities for nearly ten years.

On April 10, 1990, McLeland signed an Invention, Secrecy and Other Matters Agreement (the 1990 Secrecy Agreement), which specifically prohibited McLeland from using, directly or indirectly, proprietary information to solicit Syncor's customers. Soon thereafter, he was promoted to the position of Pharmacy Manager. Because Syncor's policy at that time was to require all managerial level employees to sign employment agreements, on August 26, 1991, McLeland signed a Director/Manager Employment Agreement (the 1991 Employment Agreement). The Employment Agreement, among other things, (1) contained a clause that prohibited McLeland from competing against Syncor for ninety days following termination of his employment; (2) prohibited McLeland from encouraging other employees to leave Syncor; (3) created an irrevocable consulting agreement option during the term of the Employment Agreement and for ninety days after its termination; and (4) provided for injunctive relief and attorneys' fees as available remedies for any dispute arising thereunder. Later, after rising to the position of Midwest Regional Manager for Syncor, McLeland signed a second Director/Manager Employment Agreement (the 1993 Employment Agreement). The 1993 Employment Agreement expressly superseded the 1991 Employment Agreement. Both the 1991 and the 1993 Employment Agreements bound McLeland to the 1990 Secrecy Agreement.

On November 28, 1994, Syncor informed McLeland that his employment was to be terminated, for business reasons, on December 31, 1994. Syncor policy provided for ten weeks of severance pay for terminated employees. In addition to this ten weeks of severance pay, Syncor offered McLeland an additional twelve weeks in exchange for his execution of a release agreement. On December 6, 1994, McLeland executed the release, thereby earning twelve additional weeks of severance

pay and releasing Syncor from any claims based on McLeland's termination.

Shortly after McLeland's termination, Syncor rehired him as a temporary pharmacist. Upon his rehire, McLeland signed an arbitration agreement (the Arbitration Agreement) and a second Invention, Secrecy and Other Matters Agreement (the 1995 Secrecy Agreement).

Syncor did not require McLeland to sign another employment agreement. In March 1995, Syncor again terminated McLeland. Beginning around October 1994, before his first termination notice, McLeland became interested in establishing a nuclear pharmacy, which he hoped to operate as a joint venture with Syncor, in the Beckley-Princeton area of West Virginia. He approached Wade Hopkins, the Director of Pharmacy Expansion for Syncor, with his plan to open such a pharmacy. Within a month, McLeland learned that Syncor was not interested in entering a joint venture to open the proposed nuclear pharmacy. Hopkins, however, felt that McLeland's idea was a good business investment, and therefore agreed to loan McLeland $20,000 to develop the business. Soon thereafter, in order to rpay the loan, McLeland gave Hopkins a 50% ownership interest in the proposed pharmacy.

In January 1995, McLeland incorporated Princeton Diagnostic Isotopes, Inc. (PDI), under West Virginia law. Hopkins, believing that PDI would not adversely affect Syncor's relationship with its customers, became involved in the business. There is no evidence, however, that Hopkins ever discussed PDI or his involvement with any of his superiors. Nevertheless, in February 1995 Syncor discovered that McLeland had incorporated PDI, and McLeland then tried to sell all or part of PDI to Syncor. The negotiations failed. Meanwhile, Syncor purchased the 50% share in PDI owned by Hopkins. However, McLeland, who held the stock certificates, has refused to

transfer them.

In late 1994 and early 1995, McLeland actively solicited the business of the two largest Syncor accounts in the Beckley-Princeton area, Beckley Hospital and Raleigh General Hospital. Although Syncor retained both accounts, the hospitals expressed interest in switching to PDI. There is also evidence that McLeland attempted to recruit an employee of the Huntington Pharmacy, the pharmacy through which Syncor served accounts in the Beckley-Princeton area.

On May 18, 1995, Syncor submitted an arbitration demand against McLeland to the American Arbitration Association (AAA), claiming that McLeland's activities involving PDI had breached the 1993 Employment Agreement, the 1990 Secrecy Agreement, and the 1995 Secrecy Agreement. On July 12, 1995, AAA scheduled the arbitration for August 21, 1995, and notified both parties. McLeland decided not to attend the arbitration, based on his belief that the dispute over PDI was not arbitrable. Meanwhile, on August 2, 1995, Syncor filed in the United States District Court for the Southern District of West Virginia a complaint and petition to compel arbitration against McLeland. On August 23, 1995 -- two days after the arbitration proceeding -- McLeland answered the complaint, denied the applicability of the Arbitration Agreement to the pending dispute, and counterclaimed, alleging intentional infliction of emotional distress, intentional interference with his business interests, and anticompetitive behavior.

Then, on September 21, 1995, Syncor filed an answer to McLeland's counterclaim and its own counterclaim, to which McLeland filed an answer on October 3, 1995.

Despite the flurry of activity in the federal court, the arbitration proceeded as scheduled and was conducted ex parte on August 21, 1995. On September 29, 1995, the arbitrator issued a

written award in which he found that McLeland violated the 1990 Secrecy Agreement, the 1995 Secrecy Agreement, and the 1993 Employment Agreement. The arbitrator ordered certain equitable relief, including an award to Syncor of 100% of the stock of PDI. On October 17, 1995, Syncor filed a motion in the district court to enforce the award.

After a hearing at which McLeland testified, the district court granted Syncor's motion to enforce the arbitration award. McLeland promptly moved for a new trial and to set aside the judgment in favor of Syncor. Syncor responded in opposition to the motion on April 25, 1996. On August 19, 1996, the district court denied McLeland's pending motions and upheld its previous order enforcing the arbitration award. McLeland appeals, claiming that the arbitration award is not enforceable because it was conducted ex parte and because the dispute was not arbitrable. He further claims that the district court erred by applying an incorrect standard of review in approving the arbitrator's allegedly erroneous rulings. Applying a de novo standard of review to the district court's decision enforcing the arbitration award, see Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 145 (4th Cir. 1993), we address each issue in turn.

II.

McLeland first argues that the arbitration award is unenforceable because it is the product of an ex parte proceeding. The district court summarily rejected this argument, concluding that AAA "rules provide for an arbitration hearing to proceed ex parte, if a party who has received proper notice does not participate in the hearing." (J.A. at 248-49.) This conclusion is correct. See Sheet Metal Workers Int'l Ass'n Local Union No. 33 v. Power City Plumbing & Heating, Inc., 934 F.2d 557, 561 (4th Cir. 1991) (holding that if the opposing party was served with proper notice and was aware of the arbitration

proceeding, then "[t]he arbitration award is valid and fully enforceable despite [that party's] absence").

McLeland, however, tries to draw a distinction between arbitration where the arbitrator is to be jointly selected by the parties and arbitration where the arbitrator is either pre-selected or joint selection is not necessary. He points out that AAA rules, which the parties agreed to follow in the Arbitration Agreement, state that"[u]nless the law provides to the contrary, the arbitration may proceed in the absence of any party . . . who, after due notice, fails to be present." (J.A. at 136-37.) In McLeland's view, when the arbitrator is to be jointly selected by the parties, then "the law provides to the contrary."

To support this position, McLeland relies upon Toyota of Berkeley v. Automobile Salesmen's Union, Local 1095, 834 F.2d 751 (9th Cir. 1987). In that case, the court explained:

> [T]he general trend of authority is clear. Under a collective bargaining agreement specifically providing for designation of an arbitrator without the participation of both parties, an arbitrator may issue an enforceable default award when one party fails to attend the hearing. If an agreement provides that the parties shall jointly select an arbitrator, however, a court may refuse to enforce an award made following an ex parte hearing before an arbitrator selected without the defaulting party's cooperation, on the grounds that the party not in default should have sued to compel arbitration.

Id. at 754 (citations omitted). Here, McLeland argues that because the agreement provides for joint selection of the arbitrator, the ex parte proceeding should not be enforced.

Without expressing any opinion on the merits of the Ninth Circuit's rule, we reject McLeland's argument. First, McLeland

errs in claiming that the arbitrator here was to be jointly selected by the parties.

On the contrary, the AAA rules, which are applicable here, provide:

> [I]mmediately after the filing of the demand or submission, the AAA shall send simultaneously to each party to the dispute an identical list of names of persons chosen from the panel.
>
> Each party to the dispute shall have 10 days from the transmittal date in which to strike any names objected to, number the remaining names in order of preference, and return the list to the AAA. . . . If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve.

(J.A. at 267.) Therefore, AAA rules provide only for joint input, not joint selection. Second, not only do AAA rules provide the method of selection here, but they also recognize the validity of an ex parte arbitration. Under McLeland's view AAA rules would be self-defeating.

An ex parte arbitration proceeding under AAA rules would never be enforceable because of the method of selection described in the AAA rules. Third, McLeland's objection more properly concerns the arbitrator that was actually selected; insofar as he complains about being deprived of his strikes, the issue is whether the arbitrator who conducted the arbitration was biased. McLeland has made no such claim, however, and has never objected to the choice of arbitrator. By his own

admission he was not prejudiced by his failure to participate in the selection of the arbitrator. We therefore conclude that the arbitration proceeding here was valid despite McLeland's failure to attend.

III.

Next, McLeland argues at some length that the dispute is not arbitrable under the Arbitration Agreement. The Arbitration Agreement itself provides for arbitration if:

> (a) Employee disagrees with an Employer decision involving Employee's compensation, position or other conditions of employment or (b) if a dispute arises out of the separation from employment of Employee by Employer then first efforts to resolve the disagreement or dispute shall be according to the problem solving procedure in the Employer's Employee Handbook. If such disagreement or dispute is not resolved by such problem solving procedures, then it shall be resolved by binding arbitration, at the request of either party, in accordance with the rules of the American Arbitration Association.

(J.A. at 27.) McLeland claims that the dispute here does not fall within the reach of either provision.

The scope of the arbitration agreement is a question to be determined by the court, not the arbitrator, and is subject to de novo review. See Summer Rain v. Donning Co./Publishers, Inc., 964 F.2d 1455, 1459 (4th Cir. 1992); see also First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920, 1924 (1995) ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." (quotations and alterations omitted)). However, "`any doubts concerning the scope of arbitrable issues should be

resolved in favor of arbitration.'" Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)); see also O'Neil v. Hilton Head Hosp., 115 F.3d 272, 273-74 (4th Cir. 1997) (same); American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 92 (4th Cir. 1996) (noting that "we may not deny a party's request to arbitrate an issue unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" (quotation omitted)). The district court invoked this presumption, applied a de novo review, and concluded that the dispute was arbitrable:

> It appears to the court that the dispute to which Syncor wished to arbitrate related to McLeland's violation of the [1995 Secrecy Agreement] while he was still employed by Syncor, his refusal to execute the Consulting Agreement, and the parties' inability to negotiate a deal involving PDI.
>
> The court finds that these matters relate to the separation of respondent from his employment with Syncor, and also relate to respondent's disagreement with Syncor's decisions involving the conditions of employment. Specifically, Syncor decided to exercise its contractual option to engage McLeland as a consultant, and McLeland refused to abide by the Consulting Agreement. In addition, the parties are in disagreement over the issue of whether McLeland was entitled to ninety days notice before his termination, which clearly relates to McLeland's separation from his employment. Finally, McLeland was, in fact, separated from his employment when Syncor discovered that he had established PDI.

(J.A. at 251-52.) We agree with this assessment, and McLeland's arguments to the contrary -- that the arbitrator somehow fouled up the issue by deciding the arbitrability question himself, that the arbitrability question remains undecided, and that there is no evidence that the "problem-solving procedures" described in the Employee Handbook were complied with -- are not persuasive. Accordingly, we affirm the district court's conclusion that the dispute was arbitrable.

IV.

McLeland's final argument on appeal is that the district court applied an incorrect standard in reviewing the arbitrator's decision. The district court relied on the standard of review set forth in Upshur Coals Corp. v. United Mine Workers of America Dist. 31, 933 F.2d 225 (4th Cir. 1991). In that case, we explained:

> [A]n arbitrator's . . . interpretation of the law is accorded deference as well. A legal interpretation of an arbitrator may only be overturned where it is in manifest disregard of the law. An arbitration award is enforceable even if the award resulted from a misinterpretation of law, faulty legal reasoning or erroneous legal conclusion, and may only be reversed when arbitrators understand and correctly state the law, but proceed to disregard the same.

Id. at 228 (quotations and citations omitted). Ordinarily, this is the correct standard. But here, the Arbitration Agreement provided that "[t]he arbitrator shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected by judicial review for any such error." (J.A. at 27.) According to McLeland, this language means that the district court should have conducted full de novo review of the

arbitrator's award.

McLeland is correct, to a point. As explained by the Fifth Circuit:

> Usually . . . the district court's review of an arbitration award is extraordinarily narrow. In a proceeding to confirm or vacate an arbitration award, the Federal Arbitration Act ("FAA") circumscribes the review of the court, providing that an award shall not be vacated unless: (1) the award was procured by corruption, fraud, or undue means; (2) there is evidence of partiality or corruption among the arbitrators; (3) the arbitrators were guilty of misconduct which prejudiced the rights of one of the parties; or (4) the arbitrators exceeded their powers.
>
> In this case, however, the parties contractually agreed to permit expanded review of the arbitration award by the federal courts. Specifically, their contract details that "[t]he arbitration decision shall be final and binding on both parties, except that errors of law shall be subject to appeal."

Agreement Apr. 29, 1991, at Article 9 (emphasis added). Such a contractual modification is acceptable because, as the Supreme Court has emphasized, arbitration is a creature of contract . . . . Because these parties contractually agreed to expand judicial review, their contractual provision supplements the FAA's default standard of review and allows for de novo review of issues of law embodied in the arbitration award.

Gateway Technologies, Inc. v. MCI Telecommunications Corp., 64 F.3d 993, 996-97 (5th Cir. 1995) (quotation and citations omitted); see also Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 479 (1989) ("Just as [the parties] may limit by

contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration may be conducted" (citation omitted)). The Fifth Circuit also pointed out that "the FAA does not prohibit parties who voluntarily agree to arbitration from providing contractually for more expansive judicial review of the award."

Gateway Technologies at 997 n.3. We therefore agree with McLeland's contention that the district court should have reviewed the arbitrator's legal conclusions de novo.

As such, the district court erred. The district court relied "on the premise that an arbitrator's award is entitled to a special degree of deference on judicial review, and may only be overturned where it is in manifest disregard of the law," and found"that the arbitrator's award was not in manifest disregard of the law." (J.A. at 258.) We decline to remand the case, however, because our own de novo review of the arbitrator's decision convinces us of its correctness. See Gateway Technologies, 64 F.3d at 997 (noting that the district court erred in applying a deferential standard of review when the arbitration agreement called for de novo review, but declining to remand the case). McLeland argues that the arbitrator erred (1) in applying the terms of the 1993 Employment Agreement and the 1990 Secrecy Agreement; (2) in finding that McLeland did not have corporate approval to engage in any of the activities at issue; and (3) in awarding relief beyond that authorized by the Arbitration Agreement. We have reviewed the record, briefs, and pertinent case law in this matter, and we have had the benefit of oral argument. Our de novo review persuades us that the arbitrator did not commit error, either legal or factual, in issuing his award. Accordingly, we conclude that although the district court applied an incorrect standard of review, that error was harmless.

V.

In conclusion, we hold that the ex parte arbitration was valid, that the dispute here was subject to arbitration, and that the arbitrator did not commit legal error in fashioning its award. The district court's order enforcing the arbitration award is therefore affirmed.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD

SYNCOR INTERNATIONAL CORPORATION,
a Delaware Corporation,

ENTERED 3/29/96

Petitioner,

v.

CIVIL ACTION NO. 1:95-0565

DAVID L. McLELAND,
an individual,

Respondent.

MEMORANDUM OPINION

Currently pending before the court is petitioner's Motion to Enforce Arbitrator's Final Award and Dismiss This Action. Petitioner's motion has been thoroughly briefed by both parties, and the court held an evidentiary hearing on this matter on March 12, 1996. Thus, petitioner's motion is mature for the court's consideration.

I. FACTUAL AND PROCEDURAL BACKGROUND

Respondent David McLeland ("McLeland") was employed in a managerial position by petitioner Syncor International Corporation ("Syncor"), a company in the business of compounding and distributing nuclear pharmaceuticals and related products and services, in a managerial position. In 1993, McLeland and Syncor entered into an employment agreement which provided that McLeland would remain subject to the Invention, Secrecy and Other Matters Agreement which was executed in 1990. In November of 1994, Syncor informed

McLeland that it was eliminating his position for business reasons, effective December 31, 1994. Syncor policy provided for ten weeks of severance pay. In addition to the standard severance pay, Syncor offered McLeland twelve weeks of additional severance pay if he would execute an "Agreement and Release" provided to him by Syncor. Syncor advised McLeland to review the document with an attorney. On December 6, 1994, McLeland signed the Agreement and Release, and thereafter received the twenty-two weeks of severance pay. Syncor rehired McLeland on a temporary basis on January 5, 1995. At that time, McLeland signed another Invention, Secrecy and Other Matters Agreement, as well as an Arbitration Agreement. In March on 1995, McLeland's temporary employment was terminated.

During October and November of 1994, respondent became interested in establishing a nuclear pharmacy in the Beckley/Princeton, West Virginia area. On January 31, 1995, McLeland's business was incorporated as Princeton Diagnostic Isotopes, Inc. ("PDI"). Syncor alleges that McLeland and PDI solicited several of Syncor's customer accounts and recruited Syncor employees to work for PDI.

In February of 1995, Syncor officials learned that McLeland had established and incorporated PDI. Syncor and McLeland attempted to negotiate a deal involving the sale of PDI to Syncor, but the deal was never finalized. Subsequently, on May 18, 1995, Syncor filed a demand for arbitration with the American Arbitration Association ("AAA") pursuant to the parties' arbitration agreement. McLeland did not respond, and an arbitrator was selected in accordance with AAA rules. On July 12, 1995, the AAA issued a notice to the parties that an arbitration hearing was scheduled on August 21, 1995.

On August 2, 1995, Syncor filed with this court a complaint and motion to compel respondent to arbitrate the

dispute. Respondent's answer was due on August 22, 1995, one day after the scheduled arbitration. The court did not rule on the motion prior toAugust 21, 1995, and Syncor elected to proceed with the arbitration. Neither respondent nor his attorney appeared at the arbitration hearing, and the arbitration proceeded ex parte in accordance with AAA rules. On September 29, 1995, the arbitrator issued a Final Award in Syncor's favor.

Syncor subsequently filed a motion with this court to enforce the arbitrator's final award and dismiss this action. McLeland has raised numerous issues in support of his countention that the arbitration agreement was not applicable to this dispute and he was not required to attend the arbitration. The court will attempt to address each of these arguments in turn.

II. ANALYSIS

A. Application of Federal Arbitration Act

The Federal Arbitration Act, 9 U.S.C. § 1, et seq. ("FAA"), provides that arbitration agreements which involve contracts or transactions affecting interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2. The FAA exemplifies the strong federal policy in favor of arbitration. In fact, the "heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." Kropfelder v. Snap-On Tools, Corp., 859 F. Supp. 952, 953 (D.Md. 1994) (quoting Peoples Security Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989)).

Respondent contends that the FAA does not apply to the

arbitration agreement signed by McLeland, because § 1 of the FAA exempts "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the application of the FAA. Respondent relies on United Electrical Radio and Machine Workers of America v. Miller Metal Products, Inc., 215 F.2d 221 (4th Cir. 1954), in support of his argument. Respondent's reliance on Miller Metal is misplaced for two reasons. First, the court in Miller Metal spoke only to the application of the FAA to disputes stemming from collective bargaining agreements, and expressly distinguished individual employment contracts. Miller Metal, 215 F.2d at 224. As the dispute between Syncor and McLeland does not involve a collective bargaining agreement, the court's holding in Miller Metal is not applicable here.

Moreover, the majority of courts throughout the country which have addressed this issue since Miller Metal have held that § 1 of the FAA should be applied narrowly, so as to exempt only those workers involved in the interstate transportation of goods. See Dickstein v. DuPont, 443 F.2d 782 (1st Cir. 1971); Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159 (7th Cir. 1984); and Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (2d Cir. 1972). Noting the existence of these cases, Senior Judge Kaufman of the District of Maryland, wrote that,

> [i]n the light of the time which has passed since the Miller Metal decision, the strong federal policy in favor of arbitration, and the great weight of circuit court authority, this Court is of the view that the Fourth Circuit would not, as of this date, apply the words used in Miller Metal so as to exclude § 1's application in all non-collective bargaining contexts, and would instead apply the views expressed by a majority of courts that as to non-collective bargaining contracts the FAA excludes only those workers involved in the interstate

transportation of goods.

Kropfelder, 859 F. Supp. At 958.

Based on the holding in Kropfelder, and the authority of other circuits, this court finds that McLeland was not involved in the interstate transportation of goods so as to fit withing the federal common law govern the present arbitration dispute.

B. Appropriateness of Ex Parte Arbitration Hearing

Respondent next argues that the arbitration should not have proceeded ex parte. The arbitration agreement signed by McLeland referred to the American Arbitration Associations' rules. Such rules provide for an arbitration hearing to proceed ex parte, if a party who has received proper notice does not participate in the hearing. In the present case, it is undisputed that McLeland, who was represented by counsel, was notified of the arbitration hearing scheduled for August 21, 1995. McLeland apparently felt that he had certain defenses that entitled him to forego the arbitration;[1] however, he never filed

---

[1] At the hearing on plaintiff's motion, McLeland testified that:

> The way I read the [arbitration] agreement, was that if I had a problem with the way they terminated me, then I had the course of going to arbitration, but the main thing was they didn't give me 90 days notice before they terminated me, so that was what they were trying to get me to do, and since they didn't do that, I didn't feel it was necessary for me to spend my money to go to that hearing.

(Tr. of motion hearing at 23-24.)

an action in this court to enjoin the arbitration hearing, nor did he elect to appear at the hearing to raise any such defenses.

As the arbitration agreement signed by respondent stated that any arbitration would be held in accordance with the American Arbitration Association rules, and respondent took no action to enjoin the arbitration, Syncor properly proceeded with the arbitration. As stated by the Fourth Circuit Court of Appeals in Sheet Metal Workers Intl. Assoc. v. Power City Plumbing and Heating, Inc., 935 F.2d 557 (4th Cir. 1991), if the record reveals that respondent was served with proper notice and was aware of the arbitration proceeding, "the arbitration award is valid and fully enforceable despite [defendant's] absence." Id. at 561 (citing Sheet Metal Workers v. Tampa Sheet Metal Co., 786 F.2d 1459, 1460 (11th Cir. 1986)).

C. Scope of Arbitration Agreement

Respondent further contends that the dispute between the parties is outside the scope of the Arbitration Agreement and should not have been submitted to arbitration. Respondent correctly asserts that this question must be resolved by the court, not the arbitrator.[2] The law interpreting the FAA is clear

---

[2] McLeland devotes much of his "Response to Petitioner's Memorandum of Law dated March 12, 1995" to the argument that the question of whether the parties' dispute is withing the scope of the arbitration agreement ahould have been adressedby the court prior to the arbitration hearing. Although resolution of this issue prior to the arbitration would have been preferable, respondent never raised this issue with the court prior to the arbitration hearing. Thus, the court had no way of making this determination before the arbitration went forward. Respondent cannot now argue that, because the question of whether the parties' dispute is within the scope of the arbitration

that when there is a dispute as to the scope of the arbitration agreement, whether the parties have agreed to submit a certain dispute to arbitration is a question to be decided by the court. Summer Rain v. Donning Company/Publishers, Inc., 964 F.2d 1455 (4th Cir. 1992).

Thus, the court must consider whether the Arbitration Agreement in this case is broad enough in scope to cover the dispute between Syncor and McLeland. The Arbitration Agreement provides that:

> [i]n the event (a) Employee disagrees with an Employer decision involving Employee's compensation, position or other conditions of employment or (b) if a dispute arises out of the separation from employment of Employee by Employer then first efforts to resolve the agreement shall be according to the problem solving procedure in the Employer's Employee Handbook. If such disagreement or dispute is not resolved by such problem solving procedures, then it shall be resolved by binding arbitration, at the request of either party, in accordance with the rules of the American Arbitration Association.

(Ex. 1 to Respondent's Resp. to Pet.'s Mem. of Law.). In reviewing the memoranda filed by respondent in this action, the court found little discussion indicating why respondent considers this dispute to be outside the scope of the Arbitration Agreement. In his response brief, respondent stated that "the arbitration clause is inapplicable to any issues prior to 1/5/95 because there was never any arbitration agreement in any prior employment contracts." (Respondent's Resp. to Pet.'s Motion

---

agreement was not previously decided by the court, the arbitrator's award is invalid, when respondent never raised this issue with the court.

at 4.) The court notes that respondent was not terminated for good until March of 1995, and Syncor did not learn of respondent's new business until February of 1995. All attempts by the parties to work out their disputes occurred between March and May of 1995. Thus, the court finds that the dispute raised in arbitration did occur after the signing of the Arbitration Agreement and was properly ruled on by the arbitrator.

During the oral argument before the court, counsel for respondent mentioned that "the Arbitration Agreement does not apply to the conduct that they are complaining of", but did not present any further argument on this point. It appears to the court that the dispute which Syncor wished to arbitrate related to McLeland's violation of the Invention, Secrecy and Other Matters Agreement while he was still employed by Syncor, his refusal to execute the Consulting Agreement, and the parties' inability to negotiate a deal involving PDI. The court finds that these matters relate to the separation of respondent from his employment with Syncor, and also relate to respondent's disagreement with Syncor's decisions involving the conditions of employment. Specifically, Syncor decided to exercise its contractual option to engage McLeland as a consultant, and McLeland refused to abide by the Consulting Agreement. In addition, the parties are in disagreement over the issue of whether McLeland was entitled to ninety days notice before this termination, which clearly relates to McLeland's separation from his employment. Finally, McLeland was, in fact, separated from his employment when Syncor discovered that he had established PDI.

For these reasons, the court concludes that the dispute between the parties did fall within the scope of the Arbitration Agreement and was arbitrable. In addition, the law is clear that courts are to resolve any doubts concerning the scope of arbitrable issues in favor of arbitration, based on the federal policy favoring arbitration. Dean Witter Reynolds, Inc. v. Byrd,

470 U.S. 213, 218 (1985). See also Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983) ("as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.")

D. Unconscionability of Arbitration Agreement

Respondent next contends that the Arbitration Agreement is unenforceable because it is unconscionable and a contract of adhesion. Again, respondent is correct in his assertion that this court may consider issues related to the execution of the agreement to arbitrate. Peoples Security Life Ins. Co., 867 F.2d at 814 n.5 (citing Prima Paint Corp. v. Flood & Conklin, 388 U.S. 395, 403-404 (1967)).

In support of this argument, counsel for respondent states that McLeland is not a highly sophisticated commercial party, was not represented by a commercial bargaining unit, and had never signed an arbitration agreement in the past. Moreover, the Arbitration Agreement was a form agreement that was not tailored specifically to McLeland's employment, and he was told that if he wanted to work for Syncor again he had to sign it. (Respondent's Resp. To Pet.'s Mem. Of Law at 4.) Respondent cites Copely v. NCR Corp., 183 W. Va. 152 (W. Va. 1990), in support of his argument. However, Copley is clearly inapplicable, as the court found that the Federal Arbitration Act did not apply to the arbitration clause, and instead applied West Virginia state law in concluding that the contract signed by Mr. Copley was a contract of adhesion. Copley, 183 W. Va. At 156.

Respondent has presented no evidence in support of a claim that he was fraudulently induced or coerced into signing the Arbitration Agreement. Respondent testified before the court that he did read the Arbitration Agreement before he

signed it, and that at the time he signed it he had no concerns or misgivings about entering into such an agreement. (Tr. Of Motion Hearing at 36.) McLeland is a well-educated, highly-trained and highly-paid individual.[3] The court finds that there was not an inequality of bargaining power between McLeland and Syncor. Thus, the court rejects respondent's argument that the Arbitration Agreement is an unenforceable contract of adhesion.

E. Damage Awarded by Arbitrator

Respondent argues that the arbitrator exceeded his authority by awarding equitable damages and attorney's fees to petitioner. In support of his argument, respondent points to the language of the Arbitration Agreement, which provides that "[t]he arbitrator shall have the power to award only actual direct compensatory damages which excludes punitive damages." (Ex. 1 to Respondent's Resp. To Pet.'s Mem. of Law.) The arbitrator ordered McLeland to pay Syncor's attorney's fees, to transfer one hundred percent of his stock in PDI to Syncor, and to cease and desist from further violations of the 1995 Secrecy Agreement and the 1993 Employment Agreement. (Arbitrator's Final Award at 13.) McLeland argues that this award was in violation of the Arbitration Agreement, as the arbitrator failed to award only direct compensatory damages.

In addressing McLeland's argument, the court first

---

[3] The 1993 Employment Agreement signed by McLeland indicates that he received a biweekly salary of $2,912.67. The court notes that the salary amount typed into the agreement, $2,882.31, had been stricken and the $2,912.67 figure written in and initialed. (Pet.'s Motion to Enforce Arbitrator's Award, Ex. A.) The court assumes that McLeland was able to negotiate the higher salary, which further indicates that there was equal bargaining power between the parties.

points out that the "standard of review of an award made under the Federal Arbitration Act is extremely narrow." (JIH v. Long & Foster Real Estate, Inc., 800 F. Supp. 312, 316-17 (D. Md. 1992) (citing United States Steel & Carnegie Pension Fund v. Dickinson, 753 F.2d 250, 252-53 (2d Cir. 1985)). Section 10(a) of the FAA sets forth the grounds for the vacation of an arbitrator's award by the district court, and provides that the court may vacate the award where the arbitrator exceeded his powers, which is apparently what respondent is alleging.

In reviewing the arbitrator's award, it is clear that the arbitrator based the damage award on the 1993 Employment Agreement and the 1995 Invention, Secrecy and Other Matters Agreement executed by the parties. The arbitrator awarded attorney's fees pursuant to paragraph 9 of the Invention, Secrecy and Other Matters Agreement and paragraph 8 of the 1993 Employment Agreement, and awarded injunctive relief pursuant to paragraph 7 of the 1993 Employment Agreement. (Arbitrator's Final Award at 11-12.)

The Arbitration Agreement provides that the terms of a written employment agreement shall prevail over the terms of the Arbitration Agreement if there is any conflict. (Ex. 1 to Respondent's Resp. to Pet.'s Mem. of Law.) Thus, if the Arbitration Agreement provided that only compensatory damages would be awarded, but an applicable employment agreement provided for additional remedies, the terms of the employment agreement prevail. Consequently, the arbitrator did not exceed his powers in awarding damages based on the prior employment agreements.

Respondent contends that this was inappropriate because the 1993 Employment Agreement was no longer in force after his termination in December of 1994 and could not be relied on by the arbitrator in awarding damages. The court finds that this is a factual issue that should have been raised as a defense in the

arbitration hearing, and is not properly before the court on judicial review. The issue of whether the arbitrator's damage award was proper is tied to the question of whether the 1993 Employment Agreement was still in effect. Thus, as this issue is "inextricably tied up with the merits of the underlying dispute," it should have been decided by the arbitrator. JIH, 800 F. Supp. At 318. In conclusion, applying the requisite narrow standard of review, the court finds that the arbitrator was within his power in making the damage award based on the underlying contracts between the parties.

F. Remaining Issues Raised by Respondent

In his memoranda and oral argument, respondent has raised several other reasons why the court should not enforce the arbitrator's award. Specifically, respondent has argued that the arbitrator failed to follow the terms of the Arbitration Agreement by not applying the law of Tennessee, the state where McLeland was employed; and that Syncor did not utilize the grievance procedures set forth in the employee handbook before proceeding to arbitration, and did not give respondent proper notice of his termination. The court finds that these are issues which should have been raised in the arbitration hearing, and are not appropriate for judicial resolution. See John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) (question of whether procedural prerequisites were complied with was a matter for the arbitrator, not the court.). The court reiterates that respondent could have participated in the arbitration hearing which was held on August 21, 1995, and chose not to do so. It is unfortunate that respondent did not participate in the arbitration hearing, and the court understands his desire to have a chance to present his side of the dispute. However, the purpose of arbitration is to avoid litigation, and respondent is not entitled to now come before the court and raise defenses which should have been the subject of arbitration. For this court to hold otherwise would undermine the federal policy favoring

arbitration.

III. CONCLUSION

For the reasons set forth above, the court finds that the Federal Arbitration Act is applicable in the present case, that an ex parte arbitration was permissible, and that the dispute between the parties is within the scope of the Arbitration Agreement and is arbitrable. The court further finds that the Arbitration Agreement is not an unenforceable contract of adhesion, and that the remaining issues raised by respondent, including the propriety of the damages award, should have been asserted in the arbitration hearing.

To the extent that respondent wishes this court to review the arbitrator's decision and award, the court relies on the premise that an arbitrator's award is entitled to a special degree of deference on judicial review, and may only be overturned where it is in manifest disregard of the law. Upshur Coals Corp. v. United Mine Workers of America, 933 F.2d 255, 228 (4th Cir. 1991). The court finds that the arbitrator's award was not in manifest disregard of the law. Accordingly, petitioner's Motion to Enforce Arbitrator's Final Award will be granted and this action will be dismissed in a separate judgment order entered this date.

Dated: 3/29/96

ENTER:

(s)_____
David A. Faber
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD

SYNCOR INTERNATIONAL CORPORATION,
a Delaware Corporation,

ENTERED 3/29/96

Petitioner,

v. CIVIL ACTION NO. 1:95-0565

DAVID L. McLELAND,
an individual,

Respondent.

JUDGMENT ORDER

In accordance with the Memorandum Opinion entered this date, the court hereby ORDERS as follows:

1. The Motion to Enforce Arbitrator's Final Award and Dismiss This Action filed by petitioner on October 17, 1995, is hereby GRANTED;

2. The Final Award of the arbitrator, dated September 29, 1995, is hereby ENTERED as the judgment of this court; and

3. This action is DISMISSED with prejudice.

The Clerk is directed to remove this action from the docket of this court and is further directed to forward certified copies of this Judgment Order and copies of the court's Memorandum Opinion to all counsel of record.

APPENDIX C

IT IS SO **ORDERED** this 29th day of March, 1996.

ENTER:

(s) David S. Faber
David A. Faber
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT BLUEFIELD

SYNCOR INTERNATIONAL CORPORATION,
a Delaware corporation,
Petitioner,

FILED 8/2/95

v.

CIVIL ACTION NO. 1:95-0565

DAVID L. McLELAND, an individual,
Respondent.

COMPLAINT AND
PETITION TO COMPEL ARBITRATION

In accordance with 9 U.S.C. §§ 2 and 4, Petitioner, Syncor International Corporation ("Syncor"), by its attorneys, Thomas A. Heywood and Benjamin L. Bailey, and Bowles Rice McDavid Graff & Love, for its petition against Respondent David L. McLeland ("McLeland"), states as follows:

The Parties

1. Syncor is a corporation duly incorporated under the law of the State of Delaware.

3. McLeland is an individual who resides in or around Sellersburg, Indiana.

Related Entities

3. Princeton Diagnostic Isotopes, Inc. ("PDI") is a corporation duly incorporated under the law of the State of

West Virginia, with its principal place of business currently located at 34 New Hope Road, Princeton, West Virginia 24740.

Jurisdiction and Venue

4. Jurisdiction is conferred upon this Court by U.S.C. § 1332, by reason of diversity of citizenship of the parties and the amount in controversy.

5. Venue in this Court is proper under 28 U.S.C. § 1391(a).

Facts Alleged

6. Syncor owns and operates several nuclear pharmacies throughout the United States, including a nuclear pharmacy in Huntington, West Virginia, which nuclear pharmacies among other things provide radioactive isotopes to certain health providers for certain diagnostic and therapeutic purposes.

7. McLeland has worked for Syncor for over ten years, and from time to time throughout his employment has executed employment and other agreements with Syncor. The terms and conditions of McLeland's employment with Syncor have been governed by the terms and conditions of such agreements which have been entered into from time to time between Syncor and McLeland.

8. On or about Februrary 1, 1993, McLeland and Syncor entered into an agreement entitled "Director/Manager Employment Agreement" (the "Employment Agreement"), a copy of which is attached hereto as "Exhibit A." Under the Employment Agreement, McLeland served as Midwest Regional Manager operating out of Syncor's Cincinnati, Ohio office and with responsibilities for Syncor's Huntington, West Virginia office. Beginning March 18, 1994 through December 31, 1994,

McLeland served as Operations Analyst.

9. On or about April 10, 1990 and again on or about January 5, 1995, McLeland and Syncor entered into an agreement entitled "Invention, Secrecy and Other Matters Agreement" (the "Confidentiality Agreement"), copies of which are attached hereto as "Exhibit B."

10. By letter dated November 28, 1994, Ms. Sharon Green ("Green") of the Human Resources Department of Syncor notified McLeland that his employment with Syncor would be terminated December 31, 1994, all according to the terms and conditions of said letter (the "Termination Letter"). Included with the Termination was a document entitled "Agreement and Release" (the "Release"), referenced in the Termination Letter, which was duly executed by McLeland on or about December 6, 1994 and subsequently executed by Green on behalf of Syncor. A copy of the Termination Letter and Release is attached hereto as "Exhibit C."

11. Effective January 3, 1995, McLeland was rehired by Syncor [at its Memphis, Tennessee office] on a temporary basis as a Release Staff Pharmacist in which capacity Mr. McLeland was employed until approximately March 1, 1995.

12. On or about January 5, 1995, McLeland and Syncor entered into an agreement entitled "Arbitration Agreement" (the "Arbitration Agreement"), a copy of which is attached hereto as "Exhibit D."

13. Upon information and belief, beginning not later than November, 1994, and while still an Operations Analyst for Syncor, McLeland commenced efforts to establish a nuclear pharmacy in Princeton, West Virginia to compete for existing and prospective customers of Syncor. McLeland's actions included but may not have been limited to utilizing proprietary

information gained while in the employ of Syncor; soliciting the participation of other Syncor employees; securing a lease of commercial office space; having PDI stationery printed; expending monies; and other actions necessary to establish PDI as a direct competitor of Syncor.

14. On or about January 31, 1995, PDI was incorporated in West Virginia by attorney Randall L. Trautwein ("Trautwein").

15. On or about February 1, 1995, Trautwein assigned half of his stock in PDI to McLeland, and the other half of his stock in PDI to Mr. Wade Hopkins ("Hopkins"), by means of a document entitled "Stock Subscription Assignment" (the "Assignment"), a copy of which is attached hereto as "Exhibit E."

16. On or about March 28, 1995, Syncor entered into an agreement with Hopkins to purchase all of Hopkins's stock in PDI, representing a Fifty Percent (50%) ownership interest in PDI.

17. Although Hopkins agreed to sell his shared to Syncor for valuable consideration, McLeland through his attorney has refused to permit the corporation to effect a transfer of shares to Syncor, alleging that said shares are subject to a buy-sell agreement in favor of McLeland.

18. Through the date of this Complaint, McLeland has failed to produce a copy of such buy-sell agreement to Syncor or Hopkins, and McLeland has also failed to effect a transfer of shares from Hopkins to Syncor, despite the desire of both Hopkins and Syncor to effect such a transfer of stock ownership in PDI.

19. Upon information and belief, Hopkins denies

knowledge of the existence of any buy-sell agreement restricting or purporting to restrict his right to sell his shares of stock in PDI, and Hopkins further denies ever accepting or agreeing to any such restriction or purported restriction on his right to sell, transfer or otherwise dispose of his shares of stock in PDI.

20. Upon information and belief, on or about March 22, 1995, McLeland mailed to Hopkins a check in the amount of Twenty Thousand Dollars ($20,000.00) which was being tendered in exchange for Hopkins's stock in PDI. Upon receiving McLeland's check on or about April 3, 1995, Hopkins rejected McLeland's tender of cash for Hopkins's shares of stock in PDI, and wrote to McLeland that Hopkins had previously agreed to sell his interest to Syncor.

21. Upon information and belief, McLeland, either individually or in his capacity as president of PDI, or both, is currently utilizing proprietary information gained while in the employ of Syncor to solicit, divert, or otherwise taken away customers and/or suppliers of Syncor, inviolation of the terms of Confidentiality Agreement. Such acts include but may not be limited to utilization of market information on the Beckley, West Virginia market and area to open and operate a centralized radiopharmacy.

22. Upon information and belief, since the severance of his employment with Syncor on or about February 7, 1995, McLeland has attempted and is attempting, directly or indirectly, to entice other employees of Syncor to leave Syncor, in violation of the terms of the Employment Agreement. Upon information and belief, McLeland has solicited the assistance or participation of the following Syncor employees: Cory Clifton, Pharmacy Manager of the Huntington pharmacy; until Wade Hopkins; and Derek Wren, Laboratory Technician I at Syncor's Huntington pharmacy.

23. By letter dated March 30, 1995, a copy of which is attached hereto as "Exhibit F," Mr. Robert Funari, on behalf of Syncor, notified McLeland, that Syncor was exercising its option to engage him as a consultant according to the terms and conditions of that certain document entitled "Consulting Agreement" (the "Consulting Agreement"), and attached as Exhibit B to the Employment Agreement.

24. Through the date of this Complaint, McLeland has failed or refused to sign and return the Consulting Agreement to Syncor, and has also refused to abide by the terms and conditions of the Consulting Agreement, in violation of the terms and conditions of the Employment Agreement. Upon information and belief, these acts include but may not be limited to the acts alleged above.

25. Despite notice from Syncor and other communications and attempted communications by Syncor, directly and through its counsel with McLeland, directly and through his counsel, McLeland continues to conduct operations of PDI in violation of the terms and conditions of the foregoing Agreements, all as alleged above.

26. As a result of the actions of McLeland and/or PDI, PDI has taken and/or threatens to take additional customers from Syncor in the future. Specifically, Syncor is informed and believes that an existing customer, Raleigh General Hospital, an account generating revenuer of $20,000 per month, has been actively solicited by McLeland and may terminate its sales relationship with PDI, with a resultant direct loss of income to PDI of $20,000 per month; and that Beckley Hospital, Inc., a customer of Syncor's whose account generates revenues of $7,500 per month, has been solicited by PDI and may terminate its purchases from Syncor, with a resulting direct loss of revenue to Syncor of $7,500.00 per month; and that other potential customers of Syncor, including those identified in the

October memorandum, have been and are being solicited by McLeland and PDI.

27. By an arbitration demand dated May 18, 1995, Syncor invoked arbitration under the Arbitration Agreement to resolve the issues set forth above, and that arbitration is presently underway before the American Arbitration Association (AAA). Under the Arbitration Agreement, the terms of the Employment Agreement - including without limitation to provisions whereby McLeland agrees that Syncor is entitled to injunctive relief for acts which do or would constitute a breech of the Employment Agreement — prevail over any conflicting terms of the Arbitration Agreement.

28. McLeland, through counsel, has denied the validity and applicability of the arbitration agreement, and declined to participate. Thus, the arbitration is proceeding ex parte. He has also declined to respond to the AAA's requests regarding a location for the arbitration.

29. On July 12, 1995, the AAA decided to conduct the arbitration in Charleston, West Virginia, and issued a notice of such hearing for August 21, 1995.

30. McLeland's acts in refusing to arbitrate and in operating PDI as its president are deliberate and willful, and taken with full knowledge of the contents of the Employment Agreement, the Confidentiality Agreement, and the Arbitration Agreement.

31. No previous application has been made for the order or relief sought herein.

32. Accordingly, and for the foregoing reasons, Syncor respectfully requests that this Court issue a preliminary injunctive relief forthwith, to be made permanent upon final

hearing, directing McLeland to proceed with arbitration on August 21, 1995, in the manner set out in the Arbitration Agreement, and enjoining and restraining McLeland and PDI, and their respective employees, agents, representatives and all other persons acting on their behalf, or in concert with them, from the following until the arbitration is concluded:

(a) Soliciting, diverting or otherwise attempting to take any of the customers or suppliers of Syncor through the use of proprietary information with which McLeland became acquainted during his employment with Syncor, all in accordance with the terms of the Confidentiality Agreement and/or the Secrecy Agreement; and

(b) Soliciting other employees of Syncor to leave Syncor or breach any agreement they may have with Syncor, all in accordance with the terms of the Confidentiality Agreement; and

(c) Taking any corporate or other action for or on behalf of PDI until such time as PDI has transferred a Fifty Percent (50%) ownership interest in PDI to Syncor.

33. Syncor further respectfully requests that the Court enter a declaratory judgment determining and declaring the respective rights of Syncor and McLeland with respect to stock ownership in PDI, by issuing an Order declaring that Syncor is a Fifty Percent (50%) shareholder of PDI, and that Syncor's agreement with Hopkins to purchase Hopkins's stock ownership in PDI for valuable consideration is valid, binding and enforceable according to its terms.

34. Syncor further respectfully requests that following an evidentiary hearing, a permanent injunction be issued against the defendants, and their respective employees, agents, representatives and all other persons acting on their behalf, or in concert with them, from engaging in any of the aforesaid acts.

35. Syncor further respectfully requests that this Court enter judgment against the defendants, and each of them, for all costs and expenses, including attorney's fees, incurred in connection with obtaining the injunctive relief sough hereby, all in accordance with the terms and conditions of the Arbitration Agreement, Employment Agreement, the Confidentiality Agreement, the Arbitration Agreement and otherwise as permitted at law or in equity.

36. Syncor further respectfully requests that this Court grant such other and further injunctive relief as may appear just and proper under the circumstances.

SYNCOR INTERNATIONAL CORPORATION
By Counsel

(s)_____
Thomas A. Heywood
Benjamin L. Bailey
BOWLES RICE McDAVID GRAFF & LOVE
1600 Commerce Square
Post Office Box 1386
Charleston, West Virginia 25325-1386
(304) 347-1100

Dated: August 2, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT BLUEFIELD

SYNCOR INTERNATIONAL CORPORATION,
a Delaware Corporation,

PETITIONER,

FILED 8/23/95

vs.

CIVIL ACTION NO. 1:95-0565

DAVID L. McLELAND,

RESPONDENT.

ANSWER

For answer to petitioner's complaint, the defendant says as follows:

1. He admits the allegations contained in Paragraph 1 of the Complaint.

2. He admits the allegations contained in Paragraph 2 of the Complaint.

3. He admits the allegations contained in Paragraph 3 of the Complaint.

4. He admits the allegations contained in Paragraph 4 of the Complaint.

5. He admits the allegations contained in Paragraph 5 of the Complaint.

APPENDIX E

6. He admits the allegations contained in Paragraph 6 of the Complaint.

7. He admits the allegations contained in Paragraph 7 of the Complaint.

8. He admits the allegations contained in Paragraph 8 of the Complaint.

9. He admits the allegations contained in Paragraph 9 of the Complaint.

10. He admits the allegations contained in Paragraph 10 of the Complaint.

11. The Respondent denies the allegations contained in Paragraph 11 of the Complaint.

12. He admits the allegations contained in Paragraph 12 of the Complaint.

13. The Respondent denies the allegations contained in Paragraph 13 of the Complaint.

14. He admits the allegations contained in Paragraph 14 of the Complaint.

15. He admits the allegations contained in Paragraph 15 of the Complaint.

16. The respondent is uninformed concerning the allegations contained in Paragraph 16 of the Complaint and calls upon the petitioner for strict proof thereof.

17. The respondent says that apparently Hopkins agreed to sell his shares to Syncor, although the defendant does not

know the details of that agreement or why that agreement was exacted, and further asserts that Hopkins had no authority to enter into that agreement with Syncor. The respondent admits that he has refused to permit the Corporation to effect a transfer of the shares to Syncor for the reason that the shares are subject to a buy sell agreement in favor of McLeland.

18. The respondent admits that he has failed to produce a written copy of the buy sell agreement, but alleges that there is a buy sell agreement and that to transfer the stock to Syncor would be a violation of that agreement.

19. The respondent does not know what Hopkins is going to admit or deny, only what the true facts are. If Hopkins is going to, under oath, deny the facts then that is further evidence of petitioner's control and manipulation of its employees, as hereinafter set forth.

20. He admits the allegations contained in Paragraph 20 of the Complaint.

21. The respondent denies the allegations contained in Paragraph 21 of the Complaint.

22. The respondent denies the allegations contained in Paragraph 22 of the Complaint.

23. He admits the allegations contained in Paragraph 23 of the Complaint.

24. The respondent admits that he has failed and refused to sign any consulting agreement with Syncor, but denies that it is in violation of any terms of his employment agreement.

25. The respondent denies the allegations contained in Paragraph 25 of the Complaint.

26. The respondent denies the allegations contained in Paragraph 26 of the Complaint.

27. The respondent admits that the petitioner attempted to invoke arbitration, but denies that his refusal to participate in arbitration is in any way a violation of any agreement he has with the petitioner. Respondent further denies any wrong doing with regard to arbitration as alleged in the Complaint.

28. The respondent admits that he has denies the validity and applicability of arbitration to the facts of this matter. The respondent further says that he, in denying to participate in arbitration, pointed out that Princeton or Bluefield, West Virginia, was a more appropriate site for the arbitration, in that the principle place of business of respondent's Corporation, which is the subject matter of this Complaint and would be the subject matter of any arbitration is recited under Paragraph 3 of the Complaint herein, to have its principle place of business at 34 New Hope Road, Princeton, WV 24740, which allegation has been admitted by the defendant herein.

29. This allegation is admitted.

30. The respondent denies the allegations contained in Paragraph 30 of the Complaint.

31. The respondent denies the allegations contained in Paragraph 31 of the Complaint.

32. The respondent denies the allegations contained in Paragraph 32 of the Complaint, and requests that the prayer for relief therein be denied.

33. The respondent denies the allegations contained in Paragraph 33 of the Complaint, and requests that the prayer for relief therein be denied.

34. The respondent denies the allegations contained in Paragraph 33 of the Complaint, and requests that the prayer for relief therein be denied.

35. The respondent denies the allegations contained in Paragraph 33 of the Complaint, and requests that the prayer for relief therein be denied.

36. The respondent denies the allegations contained in Paragraph 33 of the Complaint, and requests that the prayer for relief therein be denied.

AFFIRMATIVE DEFENSES

1. For affirmative defenses to the Complaint against him, the defendant asserts all of affirmative defenses available to him and applicable to these proceedings.

2. In the event an injunction is granted, the respondent asserts that his gross income from the operations of his business sought to be enjoined herein, are approximately $45,000.00 per month; that it would take some several months to complete proceedings herein and bring this matter to a conclusion; in the event that a preliminary injunction is issued, the defendant's business would be destroyed and it would take approximately one year to regain that business. The petitioner, in the event it is granted an injunction herein as requested, should be required to post bond in the cash amount of no less than one million dollars ($1,000,000), such bond to be subject to being increased upon application of the respondent in the event that the matters raised herein are not resolved in a timely manner.

WHEREFORE, respondent prays that the Complaint against him be dismissed with his costs. In the event the Complaint is not dismissed and that an injunction is issued, that the petitioner be required to post bond as set forth herein; and

for such other and further relief as the nature of these proceedings might require.

COUNTER COMPLAINT

For Counter Complaint against the petitioner, the respondent says as follows:

1. He adopts all of the admitted allegations.

2. The petitioner, through the exercise of its disproportionate financial power has subjected the defendant to harassment and financial hardship; has interfered with the respondent's ability to earn a living, and has intentionally inflicted emotional distress upon the defendant in the following respects and by the following acts:

A. By using its economic power and status as an employer to force Wade Hopkins to attempt to transfer his stock in PDI to it in violation of the buy sell agreement.

B. By forcing Hopkins to deny the existence of the buy sell agreement, and by forcing him to deny that he ever agreed to restrictions on his right to sell, transfer, or otherwise dispose of his shares in PDI.

C. By forcing Hopkins to breach his agreement with the respondent to sell his stock in PDI to defendant.

D. By attempting to force the respondent to sign a consulting agreement and restrict his ability to earn a living and be productive.

E. By attempting to use respondent as an example to other Syncor employees who might wish to leave the company and establish a business on their own and use its

disproportionate economic power to make an example of him in that regard.

3. All of the above conduct on behalf of the petitioner is calculated to economically destroy the respondent and by use of the disproportionate economic power of the petitioner, the petitioner is attempting to demonstrate to other employees of petitioner, its ability to control the life of the respondent and others.

4. The actions of the petitioner are an attempt to manipulate competition, become a monopoly, and improperly restrict competition.

5. The actions of the petitioner with regard to the matters set forth in this Counter Complaint are intentional, malicious and calculated to do intentional and irreparable harm and damage to the respondent by way of infliction of emotional distress and interference with his business interests.

WHEREFORE, the respondent prays judgment against the petitioner in the compensatory amount of Five Hundred Thousand Dollars ($500,000.00), and an award of punitive damages in the amount of Five Million Dollars (5,000,000.00); and for such other and further relief as the nature of these proceedings might require.

Respondent demands a jury trial of all issues so triable.

David L. McLeland, P.Q.

JOHNSTON, HOLROYD & ASSOCIATES

BY (s)_____
ROBERT E. HOLROYD
of Counsel for Defendant
1438 Main Street
Princeton, West Virginia 24740

CERTIFICATE OF SERVICE

I, ROBERT E. HOLROYD, of counsel for respondent, do hereby certify that I served a true copy of the foregoing Answer and Counter Complaint upon counsel for the petitioner, by mailing the same by United States Mail, in an envelope, postage prepaid, addressed as follows on this the 21st day of August, 1995:

THOMAS A. HAYWOOD, ESQUIRE
BENJAMIN L. BAILEY, ESQUIRE
BOWLES, RICE, MCDAVID, GRAFF & LOVE
Post Office Box 1386
Charleston, WV 25325-1386

(s)_____
ROBERT E. HOLROYD

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT BLUEFIELD

SYNCOR INTERNATIONAL CORPORATION,
a Delaware corporation,

Petitioner, **FILED 9/21/95**

v. CIVIL ACTION NO. 1:95-0565

DAVID L. McLELAND, an individual,

Respondent.

ANSWER AND COUNTERCLAIM OF SYNCOR INTERNATIONAL CORPORATION TO THE COUNTER COMPLAINT

Syncor International Corporation ("Syncor"), by counsel, answers the counter complaint of David L. McLeland ("McLeland") as follows:

1. Syncor admits the allegations contained in paragraph 1 of the counter complaint.

2. Syncor denies the allegation contained in paragraph 2 of the counter complaint and all of its subparagraphs.

3. Syncor denies the allegations contained in paragraph 3 of the counter complaint.

4. Syncor denies the allegations contained in paragraph

4 of the counter complaint.

5. Syncor denies the allegations contained in paragraph 5 of the counter complaint.

FIRST DEFENSE

Pursuant to Federal Rule of Civil Procedure 12(b)(6), the counter complaint should be dismissed because it failS to state a claim upon which relief can be granted.

SECOND DEFENSE

The counter complaint is barred by the affirmative defense of arbitration with an award forthcoming.

THIRD DEFENSE

McLeland has waived his right to assert and is estopped from asserting the counter complaint.

FOURTH DEFENSE

The counter complaint is barred by the affirmative defense of accord and satisfaction.

FIFTH DEFENSE

The counter complaint is barred by the terms of McLeland's contracts with Syncor.

SIXTH DEFENSE

The counter complaint is barred by the affirmative defenses of payment and release.

COUNTERCLAIM OF SYNCOR INTERNATIONAL CORPORATION

To the extent that the Court finds this case is not arbitrable, Syncor asserts the following counter claim:

COUNT I
Breach of Confidentiality Agreement

1. On or about April 10, 1990, and again on or about January 5, 1995, McLeland and Syncor entered into an agreement entitled "Invention, Confidentiality and Other Matters Agreement" (the "Confidentiality Agreement"), copies of which were attached to the Complaint and Petition to Compel Arbitration (the "Complaint") as Exhibit B and are incorporated herein.

2. Paragraph 5 of the Confidentiality Agreement provides that:

> During the period of Employee's employment by [Syncor], Employee shall not either directly or indirectly, (a) compete of *[sic]* set up to compete with [Syncor] in the business of [Syncor] or (b) aid or become associated with others involved in such competition.

3. McLeland violated paragraph 5 of the Confidentiality Agreement by establishing Princeton Diagnostic Isotopes, Inc. ("PDI") in late 1994 and early 1995 while he was still employed by Syncor.

4. Paragraph 7 of the Confidentiality Agreement provides in pertinent part that:

> Employee shall not, directly or indirectly, either on Employee's behalf or for any other party, use such proprietary information [names, addresses, requirements and preferences of customers] to solicit, divert or otherwise attempt to take away any of the customers or supplies of [Syncor].

5. McLeland violated Paragraph 7 of the Confidentiality Agreement by using Syncor's proprietary information to establish PDI in southern West Virginia, to solicit funds from Wade Hopkins and to solicit Raleigh General Hospital and Beckley Hospital, two of the largest account for Syncor's Huntington Pharmacy.

COUNT II
Breach of Employment Agreement

6. Syncor incorporates paragraphs 1 through 5 of its counter claim as if they were fully stated herein.

7. On or about February 1, 1993, McLeland and Syncor entered into an agreement entitled "Director/Management Employment Agreement" (the "Employment Agreement"), a copy of which was attached to the Complaint as Exhibit A and is incorporated herein.

8. Under Paragraph 4 of the Employment Agreement, McLeland again specifically agreed to be bound by all the terms and conditions contained in the Confidentiality Agreement.

9. By establishing PDI as a competitor of Syncor's clients, McLeland has violated Paragraph 4 of the Employment Agreement.

10. Paragraph 5 of the Employment Agreement provides that:

> Employee agrees during the two years after termination not to attempt, directly or indirectly to entice [Syncor's] other employees to leave [Syncor] or breach any agreement they have with [Syncor].

11. McLeland has Violated Paragraph 5 of the Employment Agreement by actively recruiting Cory Clifton to come and work with him at PDI and by attempting, through Clifton, to entice Derek Wren to leave Syncor and work for PDI.

12. Paragraph 12 of the Employment Agreement provides that for a period of ninety days after termination, Syncor in its sole discretion may exercise its option to employ the Employee as a Consultant at a favorable salary for a modest amount of work.

13. Although Syncor notified McLeland within ninety days of the December 31, 1994 termination of his Employment Agreement that it was exercising this option and submitted a Consulting Agreement to McLeland, McLeland has failed to execute the Consulting Agreement as he is required under the terms of Paragraph 12.

COUNT III
Breach of the Arbitration Agreement

14. Syncor incorporates paragraphs 1 through 13 of its counter claim as if they were fully stated herein.

15. On or about January 5, 1995, McLeland and Syncor entered into an agreement entitled "Arbitration Agreement" (the "Arbitration Agreement"), a copy of which was attached to the

Complaint as Exhibit D and is incorporated herein.

16. Under the terms of the Arbitration Agreement, McLeland agreed to "binding arbitration . . . in accordance with the rules of the American Arbitration Association" of any disputes arising out of his separation from employment by Syncor.

17. Syncor invoked the Arbitration Agreement and scheduled an arbitration for August 21, 1995.

18. McLeland failed to participate in the August 21, 1995 arbitration and thus breached the Arbitration Agreement.

19. McLeland is actively soliciting two current customers of Syncor, Raleigh General Hospital and Beckley Hospitals, accounts which are worth $23,000 and $10,000 a month, respectively. If Syncor were to lose both of the aforementioned two customers to McLeland and PDI, Syncor would lose revenues of $132,000 in 1995.

20. Additionally, Syncor has suffered consequential damages representing the additional time and expenses of Syncor employees to (i) negotiate a

WHEREFORE, Syncor International Corporation respectfully requests that the Court grant it (i) compensatory damages for McLeland's breach of the Confidentiality Agreement and the Employment Agreement at a minimum amount of $132,000; (ii) all the stock in Princeton Diagnostic Isotopes, Inc,; (iii) an order enjoining McLeland from soliciting or selling to Syncor's customers, specifically, but not limited to, Beckley Hospital and Raleigh General Hospital; (iv) an order enjoining McLeland from any further violations of the Confidentiality Agreement and the Employment Agreement; (v) Syncor's attorney's fees and costs in litigating this matter; and

(vi) such other and further relief as the Court deems just and proper.

Respectfully submitted,
SYNCOR INTERNATIONAL CORPORATION
By Counsel

(s)_____

Benjamin L. Bailey
Ronda L. Harvey
BOWLES RICE McDAVID GRAFF & LOVE
1600 Commerce Square
Post Office Box 1386
Charleston, West Virginia 25325-1386

Dated: September 20, 1995

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT BLUEFIELD

SYNCOR INTERNATIONAL CORPORATION,
a Delaware corporation,
Petitioner,

v. CIVIL ACTION NO. 1:95-0565

DAVID L. McLELAND, an individual,
Respondent.

CERTIFICATE OF SERVICE

I, Ronda L. Harvey, of Bowles Rice McDavid Graff & Love, counsel for Syncor International Corporation, certify that the **Answer and Counterclaim of Syncor International Corporation to Counter Complaint** was served upon the following parties by mailing true and authentic copies United States mail, postage prepaid, on September 20, 1995, addressed as follows:

Robert E. Holroyd, Esq.
Johnston, Holroyd & Associates
1438 Main Street
Princeton, West Virginia 24740

Counsel for David L. McLeland

(s)_____
Ronda L. Harvey

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD

SYNCOR INTERNATIONAL CORPORATION
a Delaware corporation,

PETITIONER,

vs.

FILED 10/3/95

CIVIL ACTION NO. 1:95-0565

DAVID L. McLELAND,

RESPONDENT.

ANSWER TO THE COUNTERCLAIM

For answer to the counterclaim of Syncor International Corporation, the defendant says as follows:

1. He admits the allegation contained in paragraph one of the counterclaim.

2. He admits the allegations contained in paragraph two of the counterclaim.

3. He denies the allegations contained in paragraph three of the counterclaim.

4. He admits the allegations contained in paragraph four of the counterclaim.

5. He denies the allegations contained in paragraph five of the counterclaim.

APPENDIX G

6. This allegation requires no answer.

7. He admits the allegations contained in paragraph seven of the counterclaim.

8. He admits the allegations contained in paragraph eight of the counterclaim.

9. He denies the allegations contained in paragraph nine of the counterclaim.

10. He admits the allegations contained in paragraph ten of the counterclaim.

11. He denies the allegations contained in paragraph eleven of the counterclaim.

12. The defendant admits that paragraph twelve of the employment agreement provides the language as stated. Paragraph twelve however, is not triggered in unless and until the agreement "is terminated as provided in paragraph one...." Paragraph one of that document requires that the employee, namely the defendant herein, be given ninety days prior written notice. The defendant was not given ninety days prior written notice, therefore, pursuant to the terms of paragraphs one and twelve, the consulting agreement option was not triggered in.

13. The defendant admits that the plaintiff attempted within ninety days of December 31, 1994 to exercise its option with regard to the consulting agreement, pursuant to paragraph twelve, however further pursuant to paragraph twelve, in light of paragraph one as set forth in the next preceding paragraph, this was done ineffectively.

14. This allegation requires no answer.

15. The defendant admits the allegations contained in

paragraph fifteen of the counterclaim.

16. While the defendant admits the allegations contained in paragraph sixteen, the defendant asserts that this paragraph does not go far enough inasmuch as the arbitration agreement is inapplicable to this situation since the complaint of the plaintiff in the arbitration does not arise out of the "separation from employment" of the defendant from the plaintiff.

17. The defendant admits that the plaintiff attempted to invoke the arbitration agreement. Defendant however has consistently and from the beginning taken the position that the arbitration agreement does not apply and has declined to participate in the same.

18. The defendant admits the allegations contained in paragraph eighteen of the counterclaim.

19. The defendant denies the allegations contained in paragraph nineteen of the counterclaim.

20. The defendant denies the allegations contained in paragraph twenty of the counterclaim.

AFFIRMATIVE DEFENSES

For affirmative defenses to the counterclaim against him, the defendant adopts by reference all of the affirmative defenses previously asserted in this civil action.

WHEREFORE, the defendant prays that the counterclaim against him be dismissed with his costs and that the prayer of this original counterclaim be awarded.

DAVID L. McLELAND, P.Q.

JOHNSTON, HOLROYD & ASSOCIATES

(s) Robert E. Holroyd
BY: ROBERT E. HOLROYD
Of Counsel for Defendant
1438 Main Street
Princeton, West Virginia 24740

CERTIFICATE OF SERVICE

I, Robert E. Holroyd, do hereby certify that on this the 2nd day of October, 1995, I served a true and correct copy of the foregoing Answer and Affirmative Defenses, upon counsel for the plaintiff, by depositing said copy in the United States Mail, postage prepaid, addressed as follows:

Benjamin L. Bailey, Esquire
Ronda L. Harvey, Esquire
Bowles Rice McDavid Graff & Love
1600 Commerce Square
Post Office Box 1386
Charleston, West Virginia 25325-1386

(s)
ROBERT E. HOLROYD

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD

SYNCOR INTERNATIONAL CORPORATION
a Delaware corporation,

PETITIONER,

vs.

FILED 10/17/95
CIVIL ACTION NO. 1:95-0565

DAVID L. McLELAND, an individual,

RESPONDENT.

MOTION TO ENFORCE ARBITRATOR'S FINAL AWARD AND DISMISS THIS ACTION

Syncor International Corporation ("Syncor), by counsel, respectfully moves the Court to enter judgment enforcing the September 29, 1995, Arbitrator's Final Award Including Factual Findings And the Reasons On Which The Decision Is Based ("Arbitrator's Final Award") in the matter of arbitration between Syncor and David L. McLeland ("McLeland"), American Arbitration Association Case No. 55-160-0073-95 for reasons set forth in the accompanying Memorandum of Law.

WHEREFORE, Syncor International Corporation respectfully requests that the Court (i) enforce the Arbitrator's Final Award, (ii) dismiss this action, (iii) grant Syncor its attorneys fees in enforcing the Award, and (iv) grant such other and further relief as the Court deems appropriate.

Respectfully submitted,
SYNCOR INTERNATIONAL CORPORATION
By Counsel

APPENDIX H

(s) Ronda L. Harvey
Benjamin L. Bailey
Ronda L. Harvey
BOWLES RICE MCDAVID GRAFF & LOVE
1600 Huntington Square
P.O. Box 1386
Charleston, W.V. 25325-1386
(304) 347-1100

Dated: October 16, 1995
CHS-9391

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT BLUEFIELD

SYNCOR INTERNATIONAL CORPORATION
a Delaware corporation,

PETITIONER,

vs.

FILED 4/8/96
CIVIL ACTION NO. 1:95-0565

DAVID L. McLELAND, an individual,

RESPONDENT.

MOTION FOR A NEW TRIAL PURSUANT TO RULE 59 OF FEDERAL RULES AND PROCEDURES AND MOTION TO SET ASIDE JUDGMENT PURSUANT TO RULE 60(b) OF FEDERAL RULES OF CIVIL PROCEDURE

Now comes the Respondent, by and through Counsel, Barry L. Bruce, Barry L. Bruce and Associates, and respectfully asks this Court for a new trial and/or, in the alternative, to set aside the judgment granted to Petitioners in this matter. One basis for requesting a new trial is the issue as to the scope of the Arbitration Agreement dated January 5, 1995, to be decided as a matter of law prior to the arbitration, if any. In addition, it is the duty of any judge to set aside any verdict and grant a new trial when said verdict is a miscarriage of justice. In the case at hand, the Defendant never had his "day in court" and was never given the opportunity to present defenses to the issues raised by the Petitioner. By granting the Petitioner's Motion to enforce the Arbitrator's final award and dismiss the action by the Petitioner, the Court in effect gave the Petitioner "default judgment" against the Respondent.

APPENDIX I

The Arbitrator in his opinion and the Court by its Order required the Respondent not to violate the 1993 Employment Agreement and clearly found that the 1993 Employment Agreement was arbitratable under the 1995 Arbitration Agreement. The 1995 Arbitration Agreement could not apply to the 1993 Employment Agreement because the 1993 Employment Agreement was allegedly terminated by Petitioner on December 31, 1994, and the Respondent signed a release covering said Agreement on December 6, 1994. There was never an agreement to arbitrate the 1993 Employment Agreement or the 1990 Invention, Secrecy and Other Matter Agreement. The Arbitrator, even when faced with the facts before him, ignored the fact that the Petitioner had a duty under the 1993 Employment Agreement to give the Respondent 90 days notice prior to termination and in his arbitration award, the Arbitrator found that notice was not given to Respondent until November 24, 1994, terminating the Agreement as of December 31, 1994; clearly, not 90 days. What effect the Petitioner's violation of the Employment Agreement would have on the right of the Petitioner to enforce the remaining terms and conditions of the Employment Agreement were not determined by the Court or the Arbitrator.

The Arbitration Agreement, which is the Agreement under which the Court issued its order states, "The Arbitrator shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected by judicial review for any such error." The Court completely ignored the standard of review negotiated by the parties and applied another inappropriate standard of review. The Respondent at all times relied upon the advice of his counsel concerning whether he should participate in the arbitration. The advice given to Respondent was the fact that the Petitioner filed an action to enforce the Arbitration Agreement and that action was pending before this Court and timely answer has been filed. The Court had the duty to determine whether to order the

arbitration and determine what the scope of the arbitration was to be prior to any arbitration occurring and based upon said advice the Respondent neglected to participate in the arbitration process.

Finally, there is the matter of Respondent's counterclaim which has not been dealt with by the Court bringing in other issues that are clearly not arbitratable under the Arbitration Agreement and said issues not considered by the Arbitrator's decision. The Respondent asserts that his not participating in the arbitration was due to excusable neglect or mistake that he relied upon advice from his counsel.

WHEREFORE, the Respondent respectfully moves this Court for a new trial on the issues of arbitration and respectfully requests this Court to set aside the judgment awarded to Petitioner, and for such other and further relief as this Court deems fit and just.

RESPONDENT
BY COUNSEL

(s) Barry L. Bruce
Barry L. Bruce
Counsel for Respondent
101 West Randolph Street
P.O. Box 388
Lewisburg WV 24901
(304) 645-4182
Barry L. Bruce and Associates

CERTIFICATE OF SERVICE

I, Barry L. Bruce, Counsel for Respondent, do hereby certify that on this the 8th day of April, 1996, I have served a true and correct copy of the foregoing Respondent's Motion for

a New Trial and Motion to Set Aside the Judgment upon Counsel for the Petitioner, by depositing said copy in the United States Mail, postage prepaid, first-classmail to the following address:

Thomas A. Heywood
Benjamin L. Bailey
Bowles Rice McDavid Graff and Love
1600 Commerce Square - P.O. Box 1386
Charleston WV 25325-1386

(s)_____

IN THE UNITED STATES DISTRICT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD

SYNCOR INTERNATIONAL CORPORATION
a Delaware corporation,

PETITIONER,

vs.

ENTERED 8/19/96
CIVIL ACTION NO. 1:95-0565

DAVID L. McLELAND, an individual,

RESPONDENT.

ORDER

Currently pending before the court are respondent's motion for a new trial and Jeffrey Clanton's motion to be joiNed as a party. Before the court addresses these motions, a brief discussion of the history of this case is warranted.

During late 1994 and early 1995, Syncor International Corporation ("Syncor") became involved in an employment dispute with David McLeland, who worked for Syncor in a managerial position. On May 18, 1995, Syncor filed a demand for arbitration with the American Arbitration Association ("AAA") pursuant to the parties' arbitration agreement. McLeland did not respond, and an arbitrator was selected in accordance with AAA rules. On July 12, 1995, the AAA issued a notice to the parties that an arbitration hearing was scheduled on August 21, 1995.

On August 2, 1995, Syncor filed with this court a complaint and motion to compel respondent to arbitrate the dispute, McLeland's answer was due on August 22, 1995, one day after the scheduled arbitration. The court did not rule on

the motion to compel arbitration prior to August 21, 1995, and Syncor elected to proceed with the arbitration. Neither respondent nor his attorney appeared at the arbitration hearing, and the arbitration proceeded ex parte in accordance with AAA rules. On September 29, 1995, the arbitrator issued a final award in Syncor's favor.

Syncor subsequently filed a motion with this court to enforce the arbitrator's final award and dismiss this action. The court conducted a hearing on Syncor's motion, and on March 29, 1996, issued a Memorandum Opinion and Judgment Order granting Syncor's motion, affirming the arbitrator's decision, and dismissing the case. On April 8, 1996, McLeland, having obtained new counsel, filed a "Motion for a New Trial Pursuant to Rule 59 of Federal Rules and Procedures and Motion to Set Aside Judgment Pursuant to Rule 60(b) of Federal Rules of Civil Procedure."

On April 12, 1996, Jeffrey Clanton filed a "Petition to Join and Indispensable Party and Motion for Relief from the Memorandum Opinion Entered on March 29, 1996." Clanton, who was not a party to the civil action filed by Syncor, requests that he be joined as a party pursuant to Rule 19 of the Federal Rules of Civil Procedure. The court will first consider Clanton's motion.

A. Clanton's Motion to be Joined as a Party

Jeffrey Clanton alleges that he purchased and paid for one-half of Princeton DX Isotopes, Inc. ("PDI") in March of 1995. Thus, he contends that the arbitrator's award, which requires David McLeland to transfer 100 percent of PDI stock to Syncor, deprives him of his property rights in PDI without due process of law. Clanton requests that the court allow him to intervene in this civil action and set aside its Memorandum Opinion enforcing the arbitrator's award.

Clanton filed his motion pursuant to Rule 19 of the Federal Rules of Civil Procedure, which relates to compulsory joinder of parties needed for just adjudication of the lawsuit. Rule 19, however, applies only when a party to the lawsuit is moving to add a third party. When a third party, such as Mr. Clanton, wishes to intervene in the lawsuit, Rule 24 is applicable. The court will therefore consider Clanton's motion as one to intervene under Rule 24.

Rule 24 provides for two types of intervention, intervention of right and permissive intervention. For the purposes of this opinion, the court will assume that Mr. Clanton is arguing that he is entitled to intervene as of right, as the requirements are less restrictive. Rule 24(a), which governs intervention as of right, provides that:

> Upon timely application, anyone may be permitted to intervene in an action ... when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Having thoroughly considered Clanton's entitlement to intervention in this action pursuant to Rule 24, the court finds that there are two fatal obstacles which require the court to deny Clanton's motion for intervention.

First, Rule 24(c) requires that "[a] person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefore and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought" (emphasis added). In this case, Clanton has not filed such a pleading, nor

has he otherwise attempted to adopt any original pleadings in the case. See Rhode Island Fed. Of Teachers v. Norberg, 630 F.2d 850 (1st Cir. 1980) (whether of right or permissive, intervention is conditioned by the requirement that the intervenor state a well-pleaded claim or defense to the action.)

Second, and most importantly, Clanton's motion is untimely. Regardless of whether Clanton is seeking intervention as of right or permissive intervention, "it is clear that both subsections of the Rule require that the application to intervene be timely filed." Black v. Central Motor Lines, 500 F.2d 407, 408 (4th Cir. 1974). Determination of the timeliness of an application to intervene is within the sound discretion of the court. Id. In determining the timeliness of the motion, the court should consider "how far the suit has progressed, the prejudice which delay might cause other parties, and the reason for the tardiness in moving to intervene." Gould v. Alleco, Inc., 883 F.2d 281, 286 (4th Cir. 1989).

Each of these considerations weighs against allowing intervention. First, the suit has progressed past final judgment. This court entered summary judgment in favor of petitioner on March 29, 1996. Clanton filed the motion to intervene after the court entered a final judgment in this case. Clanton cannot now intervene in a case which is no longer pending. As stated by the court in Black, "[i]ntervention is ancillary and subordinate to a main cause and whenever an action is terminated, for whatever reason, there no longer remains an action in which there can be intervention." 500 F.2d at 408 (citing Becton v. Greene County Bd. of Education, 32 F.R.D. 220 (E.D.N.C. 1963)).****

****Several courts have held that, when a motion to intervene is filed after judgment in the case, not only is the motion untimely, it must be denied for lack of jurisdiction, because there is no existing suit within the court's jurisdiction in which to intervene. See Roberts v. Carrier Corp., 117 F.R.D.

Even assuming jurisdiction, the fact that the motion to intervene was filed after judgment was entered by the court weights against allowing intervention. Moreover, the delay in filing the motion to intervene would prejudice the existing parties. If granted, Clanton's motion would require additional litigation in a case which has been exhaustively litigated, before this court and before the arbitrator, which would be time consuming and costly for all parties. In addition, if litigation in this matter continues, the execution of Syncor's judgment against McLeland will be further delayed, and Clanton and McLeland will continue to operate PDI to Syncor's disadvantage.

The final factor for the court to consider is the reason for Clanton's tardiness in moving to intervene. In his petition to join an indispensable party, Clanton provided no explanation for the tardiness of his motion. However, the court will assume that, throughout the year that this matter was in arbitration and litigation, Clanton believed that McLeland was representing his interests. The court believes that Clanton should have realized that his interest in PDI was affected by the arbitrator's award long before this court entered summary judgment. Clanton is clearly objecting to the arbitrator's award and Syncor's presentation of the facts to the arbitrator. Clanton worked with McLeland on a regular basis and surely was aware of McLeland's struggles with Syncor. The court finds that Clanton could have entered this litigation at a much earlier date to protect his interests, and that to allow him to do so now would unfairly prejudice Syncor.

For all these reasons, the court, in its discretion, hereby DENIES Jeffrey Clanton's motion to intervene. The court further DENIES Clanton's Rule 60 motion to reconsider as

---

426, 428 (N.D. Ind. 1987); see also Wright, Miller & Kane, Federal Practice and Procedure § 1917.

moot, since Clanton is not a party to this action. Finally, the court notes that the arbitrator's award required that David McLeland turn over fifty percent of the PDI stock to Syncor, as the arbitrator was assuming that Syncor, not Clanton, already owned the remaining fifty percent of the stock. McLeland can turn over his stock without damaging Clanton's interest, and Clanton can certainly take up the issue of who is the rightful owner of the remaining stock with Syncor in another forum or action. Therefore, the court finds that Clanton will not be prejudiced by the court's ruling.

B. McLeland's Motion for a New Trial

The court will now address McLeland's "Motion for a New Trial Pursuant to Rule 59 of Federal Rules and Procedures and Motion to Set Aside Judgment Pursuant to Rule 60(b) of Federal Rules of Civil Procedures." As Rule 59 is applicable only where a trial has occurred, either with or without a jury, and this case was decided on summary judgment, the court will not consider respondent's motion under Rule 59. Instead, the court will consider whether respondent is entitled to relief from the court's judgment as provided by Rule 60(b).

Rule 60(b) (1) provides that the court may relieve a party from a final judgment, order, or proceeding based on mistake, inadvertence, surprise, or excusable neglect. Respondent has clearly not shown any mistake, inadvertence or surprise which would support the reversal of the court's Order granting summary judgment in favor of petitioner. Accordingly, the court will consider only whether respondent has sufficiently proven excusable neglect. The granting of relief under Rule 60(b) based on mistake, inadvertence, surprise or excusable neglect is a matter within the sound discretion of the district court. Central Operating Co. v. Utility Workers of America, 491 F.2d 245 (4th Cir. 1974).

McLeland makes two arguments in support of his motion. First, he contends that he contested the arbitrability of the issues raised by Syncor, and that this court should have determined whether the issues were arbitrable before the arbitration occurred on August 21, 1995. This argument is not a new one; respondent made the same argument in response to petitioner's motion to enforce the arbitrator's award. The court considered that argument in its March 29, 1996 Memorandum Opinion, and ruled that "the dispute between the parties did fall within the scope of the Arbitration Agreement and was arbitrable." (Mem. Opinion at 9.) Thus, the court will not reconsider that argument in the context of respondent's Rule 60 motion. There is no element of mistake, inadvertence, surprise or excusable neglect; respondent is simply raising an argument which he advanced earlier and lost.

However, with respect to respondent's continued argument that he was relying on the court to decide this issue before the arbitration occurred, the court points out that respondent should have known that, as of August 21, 1995, a hearing before this court had not yet been scheduled. Thus, he elected to forego the arbitration on that date with the knowledge that the court had not yet resolved any disputed issues, and cannot now argue that he did not participate in the arbitration because he thought petitioner was going to schedule a hearing.

Respondent's second argument in support of his Rule 60 motion is that he was entitled to rely upon his counsel's advice in not attending the arbitration, and that such reliance constitutes excusable neglect. ("Resp.'s Mem. In Support, at 4.) The law is clear that an attorney's negligence is not a proper ground for relief from a judgment or order. See Rodgers v. Wood, 910 F.2d 444 (7th Cir. 1990), reh'g denied, 914 F.2d 260 (7th Cir. 199). See also Hoffman v. Celebrezze, 405 F.2d 833 (8th Cir. 1969) (Neither ignorance nor carelessness on the part of an attorney will provide grounds for relief under this rule

pertaining to mistake, inadvertance, surprise or excusable neglect.)

Thus, respondent is not entitled to relief under Rule 60 simply because he relied on advice from counsel which, in hindsight, may or may not have been sound. See Federal's, Inc. v. Edmonton Inv. Co., 555 F.2d 577 (6th Cir. 1977) (Rule 60 is not intended to relieve counsel of the consequences of decisions deliberately made, though subsequent events reveal that such decisions were unwise.) This court is not inclined to grant respondent relief from judgment simply because he is now dissatisfied with the advice given him by his previous counsel.

Finally, to the extent that respondent attempts to argue that the arbitrator made factual errors in his final award, such a factual argument is not the proper basis for a Rule 60 motion, and will not be considered by the court at this stage of the proceedings.

In conclusion, McLeland's motion for a new trial and motion to set aside the judgment is hereby DENIED. Jeffrey Clanton's motion to intervene is also DENIED.

The Clerk is hereby directed to send certified copies of this Order to all counsel of record and counsel for Jeffrey Clanton.

IT IS SO **ORDERED** this 19th day of August, 1996.

ENTER:

(s)_____
David A. Faber
United States District Judge

DIRECTOR/MANAGER
EMPLOYMENT AGREEMENT

Employment Agreement entered into as of this 1st day of February, 1993 by and between Syncor International Corporation, a Delaware corporation (and/or its affiliates), hereinafter called "Employer", and David McLeland hereinafter called "Employee".

The parties agree as follows:

1. Employment. Employer agrees to employ Employee as a Midwest Regional Manager beginning on the date initially set forth above, and continuing thereafter at will, subject to termination by either party, with or without cause, upon ninety (90) days prior written notice to the other party.

2. Compensation. Employer shall pay Employee a biweekly salary of ~~$2,882.31~~ $2,912.67 [1] with an annual review day as of January 1, and such fringe benefits made applicable to Employee by Employer.

3. Employee Handbook. Employer maintains an Employee Handbook, a copy of which is given to Employee. Employer reserves the right to revise said Handbook without cause or advance notice as Employer deem necessary. Employee's employment is subject to the provisions of said Handbook; however, this Agreement will control whenever its provisions are inconsistent with anything printed in the Handbook.

4. Invention, Secrecy and Other Matters Agreement.

---

[1]See Syncor letter dated 1/25/93 from Annette Isrio.

APPENDIX K

Employee agrees to be bound by all terms and conditions contained in the Invention, Secrecy and Other Matters Agreement to be executed by Employee as a condition to employment.

5. Agreement Not to Solicit Employees. Employee agrees during the two (2) years after termination not to attempt, directly or indirectly, to entice Employer's other employees to leave Employer or breach any agreement they have with Employer.

6. Agreement Not to Compete. Without Employer's written consent Employee agrees:

(a) That so long as Employee is employed by Employer and for a period of ninety (90) days from the date of termination of employment with Employer, Employee shall not compete with the Employer, directly or indirectly, either alone or as agent of or on behalf of or as shareholder, officer, director or employee of any person, corporation or other business entity, within a radius of seventy-five (75) miles of the pharmacy location(s) set forth in Exhibit A attached hereto and hereby incorporated by reference, supplying the same similar products or services within such territory for other than in-house use;

(b) In the event Employee is terminated for "cause" as defined in the Employer Employee Handbook currently dated June, 1990 as amended from time to time under the Sections entitled "Involuntary Termination/Discharge" or "Rules of Reasonable Conduct", Employer and Employee agree that Employee shall not compete for a period of one (1) year from the date of termination of employment with Employer, agent of or on behalf of or as shareholder, officer, director or employee of any person, corporation or other business entity, within a radius of seventy-five (75) miles of the pharmacy location(s) set forth in Exhibit A attached hereto and hereby incorporated by

reference, supplying the same or similar products or services within such territory for other that in-house use;

(c) This Agreement is divisible both as to the duration of the restriction and the geographical extent of the area encompassed by the restriction, and if for any reason a court should adjudge the term or area in unreasonable restraint, then such restraint shall be enforced for such lesser period and/or area as such court shall decide to be reasonable.

7. Enforcement: Injunctions. Employee is hereunder employed in a position where Employee will be rendering personal services of a special, unusual and extraordinary character and the agreements respecting competition and secrecy are of the essence. Employee's compensation for such agreements and services is substantial. Employee agrees that Employee's breach of this Agreement, including its agreements, could not reasonably or adequately be compensated in damages in an action at law and that Employer shall be entitled to injunctive relief, including a temporary injunction immediately issued upon commencement of suit, which may include but shall not be limited to restraining Employee from rendering any service that would breach this Agreement.

8. Attorney's Fees. If any legal action arises under this Agreement or by reason of any asserted breach of it, the prevailing party shall be entitled to recover all costs and expenses, including reasonable attorney's fees incurred in connection with legal action and appeals therefrom.

9. Severable Provisions. The provisions of this Agreement are severable including but not limited to particularly Paragraph 6. If any one or more provisions are contrary to applicable state law or may be determined to be unenforceable, in whole or in part, the remaining provisions shall nevertheless be binding and enforceable.

10. Governing Law. This Agreement shall be construed in accordance with the laws of the State of Ohio.

11. Integration. This Agreement is the entire agreement between the parties with respect to its subject matter, and shall supersede any previous agreements and may not be amended except in writing signed by both parties.

12. Consulting Agreement Option. Employer and Employee agree that in the event that this Agreement is terminated as provided in Paragraph 1, Employee thereby grants to Employer the irrevocable option for the existence of the Agreement (notwithstanding its termination) and for a period of ninety (90) days thereafter to enter into a Consulting Agreement with Employee attached as Exhibit B to this Agreement. Employer shall exercise said option by written notice of such exercise to Employee and thereupon said Consulting Agreement shall be considered as delivered by the parties and in full force and effect forthwith. The exercise of such option shall be in the sole discretion of the Employer; however, such exercise will generally be based on Employee's post employment circumstances and the quality of Employee's past relationship with Employer.

IN WITNESS THEREOF, the parties have hereunto set their hands to this Agreement on the date first set forth above.

SYNCOR INTERNATIONAL CORPORATION
a Delaware corporation

By (s)_____

By (s)_____
Employee

CONSULTING AGREEMENT

The AGREEMENT, made as of the date of exercise by Syncor International Corporation ("COMPANY"), of its option under the Director/Manager Employment Agreement dated _____, 19____ ("Agreement"), with_____ _____("CONSULTANT").

The parties agree as follows:

1. FIELD OF CONSULTATION: FAITHFUL PERFORMANCE

a. CONSULTANT agrees to serve as a consultant to COMPANY in the field of nuclear/home care pharmacy operation (hereinafter sometimes called "FIELD"), and to make his/her services available to COMPANY as may be required from time to time during the term and in accordance with the provisions of this AGREEMENT.

b. CONSULTANT shall perform such services as may be requested by COMPANY hereunder faithfully and to the best of his/her ability to do so. CONSULTANT shall refrain from any activities which may be detrimental to the best interests of the COMPANY.

2. DURATION OF AGREEMENT

For the term beginning on the date of option exercise and ending one (1) year later, CONSULTANT agrees to perform such work in the FIELD as from time to time may be required by COMPANY.

3. ASSIGNMENTS: TIME AND PLACE OF PERFORMANCE

a. The Executive Vice President or the person(s) designated by him shall have general direction of the work to be performed hereunder, and shall issue written assignments to CONSULTANT.

b. The time, place and maximum numbers of hours of work for the performance of CONSULTANT'S work hereunder shall be as set forth in such written assignments.

c. COMPANY may issue written assignments to CONSULTANT for up to forty (40) hours per month ("Hour Commitment"); provided, however, in the event that such written assignments in any one or more months do not total the Hour Commitment, then the COMPANY may carry over such unused hours to any other month(s) of the term and issue written assignments to use such carried over hours.

d. CONSULTANTS shall make himself/herself available to COMPANY for the performance of such services as may be requested by the COMPANY, at such times and places as the COMPANY may reasonably specify, provided that, subject to the number of hours during which CONSULTANT is to hold himself/herself available each month. CONSULTANT's assignments hereunder shall not be at times or places that are likely to unreasonably interfere with CONSULTANT'S other employment activities.

4. OTHER EMPLOYMENT DURING TERM

a. During the term of this Agreement, CONSULTANT shall not perform services for any other person, firm or corporation engaged in any activities in, or relating to, the

FIELD without first obtaining the written approval of COMPANY.

Further, CONSULTANT will keep the COMPANY informed of the name of each other person, firm or corporation with which CONSULTANT consults and the general nature of such consulting work.

b. Such written approval may be given on behalf of COMPANY only by the person designated in Paragraph 3(a) above.

5. COMPENSATION

COMPANY shall compensate CONSULTANT for services performed hereunder as follows:

(a) COMPANY shall pay CONSULTANT at the rate of One Hundred Percent (100%) of CONSULTANT base salary per month on the date of termination of employment by COMPANY payable on a bi-weekly or other basis used by COMPANY to pay its employees.

(b) In addition to the compensation above provided, CONSULTANT shall be reimbursed for reasonable travel, living and other expenses actually and necessarily incurred by him/her for travel undertaken at the written direction of COMPANY in the performance of the work hereunder, which reimbursement shall be in accordance with COMPANY's standard expense reimbursement policies.

6. INVENTIONS AND PROPRIETARY INFORMATION

a. CONSULTANT agrees to disclose promptly in writing to COMPANY all inventions or innovations, whether or not patentable, conceived or developed by him either solely or

jointly with others in connection with his/her work under this Agreement. CONSULTANT agrees to assign and does hereby assign to COMPANY all of his/her interest in such inventions or innovations and agrees that he/she will, at any time, execute any and all papers or do whatever is required to transfer all of his/her interest therein to COMPANY or to obtain or maintain United States or foreign patents or both thereon.

b. CONSULTANT agrees that all information, including but not limited to writing, drawings, models or oral disclosures, acquired by CONSULTANT in connection with his/her work under this Agreement or in performance of such work is or shall become the sole property of COMPANY and will be held by CONSULTANT in strict confidence at all times and will not be used by CONSULTANT or disclosed by CONSULTANT to any person, firm or corporation without first obtaining the prior written consent of COMPANY.

7. COMPANY PROPERTY

Upon termination of this Agreement, CONSULTANT agrees to return to COMPANY all its property of which he/she has had custody and to deliver to COMPANY all notebooks, reports, and other data relating to the work conducted by him/her.

8. GENERAL

This Agreement shall not be assigned by CONSULTANT. It is made with CONSULTANT as an independent contractor and not as an employee of COMPANY. This Agreement shall be construed in accordance with, and its performance shall be governed by, the laws of the State of

_____.

IN WITNESS WHEREOF, the parties have executed this Agreement on the day first written above.

AMERICAN ARBITRATION ASSOCIATION
BEFORE DAVID V. BREEN, ARBITRATOR

In the Matter of Arbitration Between:

SYNCOR INTERNATIONAL CORPORATION
AND
DAVID L. McLELAND

AAA Case No. 55-160-0073-95

ARBITRATOR'S FINAL AWARD INCLUDING FACTUAL FINDINGS AND THE REASONS ON WHICH THE DECISION IS BASED

Hearing:	August 21, 1995
Brief received by AAA:	August 30, 1995
Brief received by Arbitrator:	September 1, 1995
Award Issued:	September 29, 1995

APPEARANCES:

For Syncor: (1) Bowles Rice McDavid Graff & Love
by Attorney Benjamin L. Bailey, and
Attorney Ronda L. Harvey
(2) Haig Bagerdjian
(3) Robin Jones

For McLeland: None

APPENDIX M

A. INTRODUCTION

Syncor International Corporation ("Syncor") is in the national and international business of compounding and distributing nuclear pharmaceuticals and related products and services.

David L. McLeland ("McLeland") was employed by Syncor as a manager and in other capacities.

B. BACKGROUND AND FACTUAL FINDINGS

1. History of Employment and Various Agreements

McLeland was first employed by Syncor in the mid-1980's. Thereafter, he continued to work for Syncor in various capacities, except for a brief period of time in the late 1980's where he left Syncor to work elsewhere.

On April 10, 1990 he entered into an Invention, Secrecy and other Matters Agreement ("1990 Secrecy Agreement") with Syncor. On August 26, 1991 he entered into a Director/Manager Employment Agreement ("1991 Employment Agreement"). Syncor's existing policy at that time was to require that all "manager" level employees and above enter into such an agreement with Syncor. McLeland had progressed to the position of Pharmacy Manager and thus, under corporate policy, the 1991 Employment Agreement was executed.

Later, effective February 1, 1993, the parties entered into a second Employment Agreement ("1993 Employment Agreement"). At this time McLeland was now a Midwest Regional Manager for Syncor.

Both the 1991 and 1993 Employment Agreements contained a provision where McLeland agreed to be bound by

the 1990 Secrecy Agreement as well. The 1993 Employment Agreement expressly superseded any prior Employment Agreement. Thus, as of February 1, 1993, the parties were subject to the 1990 Secrecy Agreement and the 1993 Employment Agreement.

By letter dated November 28, 1994 Syncor informed McLeland that it was necessary for Syncor to eliminate his position for business reasons. The effe.
ctive date of his termination of employment was December 31, 1994. Company policy provided for 10 weeks of severance pay. Syncor offered McLeland the 10 weeks of severance pay without any strings attached. However, he was also offered an additional 12 weeks of severance pay, if he chose to sign an "Agreement and Release" which was tendered to him. He was advised in writing that he could take time to review the Agreement and Release, preferably with his attorney. And, he was given until January 14, 1995 to sign and return the document in order to receive the enhanced severance pay.

McLeland acknowledged receipt of this letter and executed the Agreement and Release on December 6, 1994. Thereafter, in December of 1994 McLeland received the regular and enhanced severance pay for a total of 22 weeks of pay.

Syncor rehired McLeland, on January 5, 1995, as a temporary Pharmacist. At that time McLeland signed another Invention, Secrecy & Other Matters Agreement ("1995 Secrecy Agreement") and an Arbitration Agreement. The parties did not enter into any Employment Agreement at the time of his re-hire on January 5, 1995.

Thereafter, his employment was terminated again in March of 1995.

2. Creating Princeton Diagnostic Isotopes, Inc.

In October of 1994, the Director of Pharmacy Expansion for Syncor, Mr. Wade Hopkins ("Hopkins"), was approached by McLeland regarding the need to establish a nuclear pharmacy in the Beckley-Princeton, West Virginia area. McLeland proposed that Syncor enter into a joint venture with him to establish the proposed nuclear pharmacy. At about the same time McLeland sent Hopkins a memorandum which listed the hospitals in the Beckley-Princeton area and their interest in a nuclear pharmacy. Hopkins suggested to McLeland that he present his proposal to Meng Eliott ("Eliott"), Senior Program Manager for Syncor.

Later, in early November 1994 McLeland sent cost analysis sheets to Hopkins. The cost analysis sheets, prepared by McLeland, compared the prices that prospective customers were paying at the time to what those same customers would pay if they purchased from the proposed joint venture. Two (2) of the prospective customers, Beckley Hospital and Raleigh General Hospital, were current customers of Syncor. Such customers were then being serviced by Syncor through its existing nuclear pharmacy in Huntington, West Virginia. The cost analysis sheets for Beckley Hospital and Raleigh General Hospital showed the exact costs these hospitals were paying for Cardiolite product from Syncor and McLeland proposed to charge the same price as Syncor.

Shortly thereafter, in November of 1994, McLeland informed Hopkins that Syncor was not interested in entering into a joint venture for the purpose of establishing a nuclear pharmacy in the Princeton-Beckley, West Virginia area. However, Hopkins felt that McLeland's idea was a good business investment and he, therefore, agreed to and did loan McLeland $20,000 to develop the business.

Before the nuclear pharmacy was incorporated,

McLeland offered Hopkins a 50% ownership in the pharmacy to repay the loan and Hopkins accepted. The pharmacy at issue was incorporated on or about January 31, 1995 as Princeton Diagnostic Isotopes, Inc. ("PDI"). Hopkins became involved in this business because of his belief, based on discussions with McLeland, that the proposed nuclear pharmacy in the Princeton-Beckley area would not adversely affect Syncor's relationship with any of Syncor's customers. There is no evidence that Hopkins discussed this deal or his involvement with any of his superiors.

3. Solicitation of Customer Accounts

In any event, despite assurances to the contrary, and without appropriate corporate approval by Syncor, McLeland began making contact with the two (2) largest of Syncor's Huntington Pharmacy accounts, Beckley Hospital and Raleigh General Hospital ("Beckley Accounts"). Such accounts represent about 45% of the Huntington Pharmacy's business. The Beckley Accounts were (and still are) under contract with Syncor to purchase radiopharmaceutical products and nuclear medicine from Syncor. The Beckley Hospital contract is worth approximately $10,000 per month and the Raleigh General Hospital contract is worth approximately $23,000 per month. Such contracts expire in 1997 and 1999, respectively.

It is clear from the testimony of Mr. Haig S. Bagerdjian, Vice President and General Counsel ("General Counsel") for Syncor, and correspondence submitted to him by McLeland in February of 1995 that McLeland actively solicited the Beckley Accounts in late 1994 and early 1995. Further, by March of 1995 McLeland's PDI business card was posted on the bulletin board of Syncor's customer contact at the hospital, Linda Morrison. In April of 1995 Ms. Morrison, during a telephone conversation with Ms. Gianna M. Imperi, a Sales Consultant for Syncor, stated that the hospital wanted to start dealing with PDI

as of May 1, 1995. This conversation was followed up by a meeting between Ms. Morrison, Ms. Imperi, and Ms. Imperi's manager, Ms. Robin Jones ("Jones"), on May 10, 1995. During that meeting Ms. Morrison indicated that the hospital wanted to break its contract with Syncor and commence doing business with PDI. It is also clear from the testimony of Jones that Ms. Morrison had threatened on other occasions to try PDI. Throughout late 1994 and early 1995, McLeland was actively soliciting the hospital's business and the hospital was actively attempting to do business with PDI.

Further, McLeland was observed on 2 occasions at the Beckley Hospital. The first occasion involved a situation where Ms. Imperi was informed by a delivery person for the Huntington Pharmacy that McLeland was observed talking to Mr. Bill Crawford (Syncor's customer contact at the hospital) in either January or February of 1995. This delivery person did not submit an affidavit or testify in this proceeding. Ms. Imperi, herself, observed McLeland in the hallway of the Hospital leading to Mr. Crawford's office. In addition, on March 8, 1995, the Manager of the Huntington Pharmacy, Mr. Corey Clifton ("Clifton") admitted that McLeland had targeted both of the Beckley Accounts and engaged in a dialog with Syncor's customer contacts at those accounts for the purpose of obtaining such business for PDI. Although Clifton did not submit an affidavit or testify in this proceeding, the evidence as a whole clearly demonstrates that McLeland was soliciting the business of the Beckley Hospital in late 1994 and in 1995.

With respect to the contention that McLeland may have sold competing products to the Beckley Hospital, the most that can be concluded is that Derek Wren ("Wren"), a Lab Technician for the Huntington Pharmacy, saw a small ammunition can of radioactive materials (in July of 1995) at the Beckley Hospital that did not come from the Huntington Pharmacy.

Although Mr. Crawford may have ordered an extra dose of this material for the weekend and although PDI may have been the only other pharmacy nearby, this evidence does not demonstrate the PDI sold the material to the Beckley Hospital.

4. Attempting to Recruit Employees of the Huntington Pharmacy

In October of 1994 Wren was approached by his boss, Clifton, and asked if he was interested in relocating to the Princeton, West Virginia area. The details of the move were sketchy and Wren indicated that any such relocation would depend on the circumstances. In January of 1995 the specifics became clearer as Clifton actually offered Wren a job at the Princeton Pharmacy at twice the salary he was currently making. Wren was noncommittal but did travel to Princeton, West Virginia in early February of 1995, and was present when Clifton talked to a contractor about blueprints for the facility. Later, they look at some residential units and Wren was informed that if he accepted a job at the Princeton Pharmacy he could share living quarters with McLeland. Clifton continued to recruit Wren during March of 1995 and eventually Wren told him that he had no interest in relocating.

On or about March 3, 1995 Ms. Sharon Green, Supervisor of Human Resources for Syncor, became aware of reports that McLeland and Clifton were in the process of developing a nuclear pharmacy in Princeton, West Virginia. She was also concerned about reports she was receiving that both Clifton and McLeland were actively recruiting Syncor employees to join PDI. She traveled to the Huntington Pharmacy where she was joined by Jones. They interviewed Clifton and other employees. Although Clifton admitted that he has been assisting McLeland in ordering supplies through the Huntington Pharmacy for PDI, he defended his activities on the basis that McLeland had told him that the Princeton Pharmacy

was going to be a joint venture with Syncor. He also adamantly claimed that no other employees were involved with PDI.

The next day, March 4, 1995, Wren furnished a business card to Jones which contained the PDI name, logo, and Clifton's name.

On March 8, 1995 Clifton was suspended for his involvement in this matter and his employment was later terminated effective March 21, 1995.

Based on the evidence above and the record as a whole, I find that Clifton carried out the above described recruiting and other activities on behalf of McLeland and PDI.

5. The Attempt to Resolve the Issues

In about March of 1994 McLeland's career with Syncor took a turn for the worse. He was a Midwest Regional Manager for Syncor with significant management responsibilities. However, Syncor reorganized and McLeland found himself in an Operations Analyst position. Although his new position was described to him as an important one, he did not hold the same view. He no longer had any significant management responsibilities. His assignment was one of a trouble-shooter for Syncor's Executive Director of Eastern Operations, Mr. Jim Stone ("Stone"). Stone had six (6) General Managers reporting to him. Each of the General Managers had substantial management responsibilities. McLeland had no one reporting to him as an Operations Analyst.

It is clear from the evidence that after March 1994 no one managed the activities of McLeland. Instead of performing analysis he was left alone to do whatever he wanted to do. He then carved out his own niche as a floating Pharmacist helping out at various Syncor Pharmacies across the country.

In August of 1994 McLeland began to inquire about opening up an independent pharmacy in Morgantown, West Virginia. Syncor had previously established 2 such pharmacies, 1 in Florida and 1 in a Midwest location. The Morgantown, West Virginia area was also under consideration. However, from the view of Syncor such independent pharmacies had not been successful, therefore, McLeland was informed by Eliott that an independent pharmacy in Morgantown, West Virginia was no longer a consideration.

McLeland then began planning and pursuing establishing a nuclear pharmacy in the Beckley-Princeton area as a joint venture with Syncor. Syncor rejected this idea in November of 1994. However, McLeland continued to pursue the establishment of this pharmacy. There is no evidence that any officer of Syncor (or any other management person with authority to approve such activities) was aware of his activities or approved his activities, except Hopkins who was told by McLeland in November of 1994 that Syncor had rejected the idea. Thereafter, Hopkins continued to be intimately aware of the continued development of this business by McLeland. He invested in it. He received floor plans from Clifton in November of 1994. He received a proposed lease for space from McLeland in December of 1994. He received proposed letterhead from McLeland in December of 1994. He learned that PDI had been inforporated in January of 1995. He was kept fully informed of most of the significant details involved. His excuse for not reporting all of this was simply that he was convinced that this buiness would not be competing with Syncor. Frankly, this arbitrator is skeptical of his claim. Nevertheless, there is no evidence that Hopkins reported any of these activities to any responsible person at Syncor. Nor should Syncor be held to have approved these activities, just because of the actions of 1 high ranking executive.

It was not until January or February of 1995 that

Syncor's officers in California became aware that McLeland was attempting to set up a competing pharmacy. The General Counsel was then charged with the responsibility to resolve this problem.

The General Counsel testified in this proceeding. He was caught between the rock and the hard place. McLeland was positioned to compete with Syncor's Huntington Pharmacy and to do significant damage, especially with respect to the Beckley Accounts.

The General Counsel contacted McLeland in February of 1995 regarding his activities. McLeland immediately responded by attempting to negotiate a deal with Syncor to sell al or part of PDI to Syncor. The General Counsel decided to take the tact of attempting to resolve the situation. He felt that protracted litigation was not the best solution. Negotiations ensued between Syncor and McLeland but the parties could not come to terms, the deal was never finalized, and the problem was not resolved.

Correspondence from McLeland to the General Counsel in February of 1995 and other evidence has caused this arbitrator to ask the questions, did McLeland have actual or apparent authority to proceed with setting up PDI? Syncor has steadfastly claimed that he did not have any authority. Based on the record this arbitrator must agree with Syncor. If McLeland had authority he did not choose to attend the arbitration and testify in that regard. Based on the record, I find the McLeland did not have corporate approval to engage in any of the activities at issue in this case.

When negotiations over the sale of PDI fell through, Syncor exercised an option to retain McLeland as a consultant. By letter dated March 30, 1995, Syncor notified McLeland that Syncor was exercising its option to engage him as a consultant

according to the terms of the Consulting Agreement attached as an exhibit to the 1993 Employment Agreement. McLeland was to sign the Consulting Agreement and return it to Syncor. McLeland never executed the Consulting Agreement.

During this same time, Syncor decided to purchase Hopkins' 50% interest in PDI. McLeland has refused to transfer such PDI stock, claiming that it was subject to a buy-sell agreement in favor of McLeland. The only agreement Hopkins entered into with McLeland was a verbal agreement to sell his 50% interest in PDI to McLeland, contingent upon receiving $20,000 from McLeland before March 28, 1995. When McLeland failed to make the payment, Hopkins entered into an agreement with Syncor to sell his stock to Syncor. After he sold the stock to Syncor, Hopkins received a check from McLeland on or about April 3, 1995. Hopkins returned the check and wrote to McLeland that he had already sold his shares to Syncor.

6. Arbitration History

Syncor filed a Demand for arbitration with the American Arbitration Association (AAA) on May 18, 1995. No Answer to the Demand was filed with AAA and the Demand was considered to have been generally denied.

Thereafter, this arbitrator was selected to hear this case in accordance with applicable AAA Rules. Also, in accordance with applicable Rules, a hearing date was set for August 21, 1995. All parties were duly notified of the hearing date and a hearing was conducted on August 21, 1995. McLeland, who is represented by Counsel, did not attend the hearing. Nor did his Counsel attend the hearing. This arbitrator, in accordance with AAA Rules, conducted an Ex Parte Hearing in which a full and complete record was obtained from Syncor. This arbitrator requested that briefs be filed by the parties by August 28, 1995.

McLeland's Counsel was duly notified of the briefing schedule by AAA.

This arbitrator received a brief from Syncor which was transmitted through AAA. No brief was received from McLeland.

C. Analysis of Issues, Additional Findings and Rationale

I have reviewed the various agreements at issue and concluded that the operative ones are the 1993 Employment Agreement, the 1990 and 1995 Secrecy Agreements, and the Arbitration Agreement entered into in 1995. Based on an intensive review of those agreements and the record as a whole I find them to be valid and enforceable legal agreements. There is no evidence that such agreements were not entered into freely. McLeland signed all of the applicable agreements. The terms of the agreements are reasonable in light of the positions held by McLeland and the access he had to important proprietary and confidential information. The agreements are more than fair. They are of the type you would expect a corporation like Syncor to require to protect its valid business interests. None of the provisions impose any requirements on McLeland that should be stricken or held unenforceable under applicable law.

1. Arbitrability

Although no issue of arbitrability was raised during the Ex Parte Hearing, I have decided to address this issue.

Under applicable law an employer and employee can enter into an agreement to submit employment disputes to binding arbitration in lieu of the court system. Such an agreement was entered into by the parties in this dispute.

It is clear that this dispute is subject to the Arbitration Agreement. There are 2 events subject to such agreement. The first event is a situation where the Employee disagrees with the Employer decision involving Employee's compensation, position or other conditions of employment. The second event is applicable if a dispute arises out of the separation from employment of Employee by Employer.

In the case of either of the above events the parties then agreed that efforts would first be made to resolve the disagreement or dispute in accordance with problem solving procedures in the Employer's Employee Handbook. The applicable Handbook procedures were not tendered into evidence but it is clear that the parties engaged in problem solving discussion, correspondence and negotiation beginning in February of 1995 and ending in as late as May of 1995. Those efforts satisfy this requirement.

The remainder of the agreement applicable to the arbitrability issue states that "if such disagreement or dispute is not resolved . . . then it shall be resolved by binding arbitration, at the request of either party. . ." In this case Syncor submitted this matter to binding arbitration. And, whether the issue submitted is viewed: as an Employee disagreement alone; or a dispute arising out of the separation from employment of McLeland by Syncor alone; or, both, it is clearly a matter that the parties agreed to submit to bind arbitration. The evidence in this case clearly demonstrates that this was an Employee disagreement over issues affecting terms and conditions of McLeland's employment. Further, the evidence clearly demonstrates that there was a dispute arising out of the separation from employment of McLeland by Syncor.

Therefore, this arbitrator has jurisdiction to decide the issues in this case.

2. Contract Violations

Paragraph 5 of the applicable 1990 and 1995 Secrecy Agreements prohibited McLeland (while employed by Syncor) from directly or indirectly competing with or setting up to compete with Syncor. It further prohibited him from aiding or becoming associated with others involved in such direct or indirect competition. This paragraph was violated by McLeland when he established PDI in late 1994 and early 1995 while he was still employed by Syncor.

Paragraphs 7 or 8 (as the case may be) of the applicable 1990 and 1995 Secrecy Agreements prohibited McLeland from directly or indirectly using proprietary information to solicit, divert, or otherwise attempt to take away any of the customers or supplies of Syncor. McLeland violated this provision by using Syncor's proprietary information to establish PDI, to solicit funds from Hopkins and to solicit the Beckley Accounts.

Under paragraph 4 of the 1993 Employment Agreement, McLeland again specifically agreed to be bound by all the terms and conditions contained in the Secrecy Agreements. By establishing a competitor for Syncor's clients, McLeland has also violated paragraph 4 of the 1993 Employment Agreement.

Paragraph 5 of the 1993 Employment Agreement provided that McLeland, during the 2 years after termination of employment, not attempt, directly or indirectly, to entice Syncor employees to leave Syncor or breach any agreement they have with Syncor. An issue arises here since this agreement terminated on December 31, 1994. Thereafter, on January 5, 1995, McLeland was rehired as a temporary Pharmacist without any new employment agreement. The issue is whether the event of a rehire without any new employment agreement nullified this paragraph or the 1993 Employment Agreement as a whole? I find that, in the absence of any written provision addressing this

issue, any of the express terms of the 1993 Employment Agreement which have continuing viability beyond the termination date must continue to be adhered to. Therefore, McLeland violated paragraph 5 by: actively recruiting Clifton to come and work with him at PDI; and, by attempting, through Clifton, to entice Wren to leave Syncor and work for PDI.

Paragraph 12 of the 1993 Employment Agreement provides that for a period of 90 days after termination of McLeland's employment, Syncor, in its sole discretion, may exercise its option to retain McLeland as a Consultant at a favorable salary for a modest amount of work. Syncor was required to exercise said option by written notice of such exercise to employee within 90 days. McLeland's attorney was contacted by Syncor within 90 days and informed of the exercise of the option. Further, the written notice was dated and seny to McLeland within 90 days of March 30, 1995. This exercixe of the option was a valid one within the meaning of paragraph 12. McLeland failed to execute the Consulting Agreement or fulfill his other obligations as required.

D. Requests for Relief and Decision

1. Syncor has requested that this arbitrator issue an injunction pursuant to paragraph 12 of the 1993 Employment Agreement, ordering McLeland to execute the Consulting Agreement and requiring enforcement of such agreement. Although I could issue an order of the type requested I hereby decline to do so. There is so much bad blood between the parties that requiring McLeland to be a consultant to Syncor as outlined in the Consulting Agreement is simply not in the interest of either party. McLeland's failure to comply with paragraph 12 is adequately compensated for by the relief granted later below. In light of other decisions with respect to relief outlined below, the parties may want to mutually agree to a consulting arrangement. In that event they should endeavor

to reach an understanding. However, neither party shall be required to enter into any such consulting agreement.

2. Syncor has asked this Arbitrator to provide a damage award, including but not limited to stock in PDI. Syncor indicates that it is difficult or impossible to estimate with accuracy the amount of compensatory damages to which it is or may be entitled to due to McLeland's breach of the applicable Secrecy Agreements and the 1993 Employment Agreement. They cite the active solicitation of the lucrative Beckley Accounts and the possibility of loosing those accounts as a major area where damages must be estimated.

The arbitrator is mindful that: had McLeland not engaged in all of the prohibited activities that he did; and, had he just sat back and waited until the specified time periods set forth in the 1993 Employment Agreement expired, then he could have actively solicited the Beckley Accounts, to his hearts content. He could have then set up PDI and competed directly with Syncor for that matter. Syncor stipluated at the hearing that they were not claiming that McLeland violated Paragraph 6 (Agreement Not to Compete) of the 1993 Employment Agreement for various reasons. The arbitrator is also mindful that McLeland engaged in serious prohibited activity while he was employed with Syncor. He was actively courting the Beckley Accounts for PDI while he was employed with Syncor. And, that same activity has continued after his employment was terminated as well. However, as of the date of the hearing the Beckley Accounts were still in tact. Counsel for Syncor submitted a cover letter with his brief filed after the hearing. His letter indicated that Syncor had received notice from Raleigh General Hospital that it had concealed its contract with Syncor. His letter also indicated that an affidavit regarding this claimed event may be submitted. No such affidavit was forthcoming.

Based on the record as a whole this arbitrator is not

willing to speculate and estimate compensatory damages that are not capable of being calculated with respect to the Beckley Accounts. The damage done to Syncor by McLeland's prohibited activities, including any damages incurred by Syncor to negotiate with McLeland and to convince the Beckley Accounts to remain with Syncor, are adequately covered by the relief granted below.

I agree with Syncor that they are clearly entitled to all of the stock in PDI. They have already paid Hopkins for his 50% ownership in PDI. The remaining 50% does represent the fruit of McLeland's violations of the applicable Secrecy Agreements and the 1993 Employment Agreement. Therefore, McLeland is hereby ordered to immediately take all necessary steps to transfer 100% stock ownership in PDI to Syncor. Until such time as this transfer is accomplished and operation of PDI is turned over to Syncor, McLeland is to operate PDI in a prudent and efficient manner in constructive trust for Syncor. In the event of any dispute over this requirement the arbitrator retains jurisdiction to resolve such dispute.

3. I agree with Syncor that pursuant to paragraph 9 of the applicable Secrecy Agreements Syncor is entitled to recover its reasonable attorney's fees incurred prior to commencement of this arbitration and all expenses, including reasonable attorney's fees incurred in any appeal from an action brought to enforce any of the terms, covenants, or conditions. Similarly, I agree with Syncor that, pursuant to paragraph 8 of the 1993 Employment Agreement, it is also entitled to reasonable attorney's fees incurred in connection with this arbitration and appeals therefrom if Syncor prevails. Therefore, McLeland is ordered to pay such reasonable attorney's fees and related expenses as soon as practicable following receipt of this decision. In the event of any dispute over the amount or payment of such attorney's fees and related expenses, this arbitrator retains jurisdiction to resolve any such dispute.

4. Syncor has requested Injunctive relief pursuant to paragraph 7 of the 1993 Employment Agreement for McLeland's violations of paragraphs 4, 5 and 12 of the same agreement. Consistent with the findings in this decision and the relief outlined above, the following injunctive relief is ordered: (i) McLeland is hereby ordered to make an immediate transfer to Syncor of 100% of the stock in PDI; (ii) McLeland is hereby ordered to cease and desist from soliciting or selling to Syncor's customers, specifically, but not limited to, Beckley Hospital and Raleigh General Hospital; and (iii) McLeland is hereby ordered to cease and desist from further violating the 1995 Secrecy Agreement and the 1993 Employment Agreement.

E. Award of Arbitrator

(See next page)

AMERICAN ARBITRATION ASSOCIATION

In the Matters of the Arbitration between

SYNCOR INTERNATIONAL CORPORATION

AND

DAVID L. McLELAND

CASE NUMBER: 55-160-0073-95

EX PARTE **AWARD OF ARBITRATOR**

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and dated January 5, 1995 and having been duly sworn and have duly heard the proofs and allegations of Syncor International Corporation, and David L. McLeland, have failed to appear after due notice by mail in accordance with the Employment Dispute Resolution Rules of the American Arbitration Association, AWARD, as follows:

This Award is intended to be consistent with the findings in this decision and the relief granted above as follows:

1. McLeland is hereby ordered to immediately transfer to Syncor 100% of the stock in PDI. Until such time as this transfer is accomplished and operation of PDI is turned over to Syncor, McLeland is to operate PDI in a prudent and efficient manner in constructive trust for Syncor.

2. McLeland is hereby ordered to pay to Syncor its reasonable attorney's fees incurred prior to commencement of

this arbitration and all expenses, including reasonable attorney's fees incurred in any appeal from an action brought to enforce the provisions of the applicable Secrecy Agreements. Further, McLeland is hereby ordered to pay to Syncor reasonable attorney's fees incurred in connection with this arbitration and appeals therefrom if Syncor prevails. Such awarded attorney's fees and expenses shall be paid to Syncor as soon as practicable following receipt of this Award.

3. McLeland is hereby ordered to cease and desist from soliciting or selling to Syncor's customers.

4. McLeland is hereby ordered to cease and desist from further violating the 1995 Secrecy Agreement and the 1993 Employment Agreement.

5. The administrative fees of the American Arbitration Association shall be borne equally by the parties. Said fees shall be paid as directed by the Association.

6. The out-of-pocket expenses incurred by the arbitrator are to be paid equally by the parties. Said expenses shall be paid as directed by the Association.

7. The arbitrator's fees for handing the hearing, studying the record and preparing factual findings and the reasons on which the decision is based shall initially be borne by Syncor. McLeland is hereby ordered to reimburse Syncor for one-half (1/2) of the arbitrator's fees. Said fees shall be paid as directed by the Association.

8. This Award is in full settlement of all claims submitted to this arbitration. The arbitrator retains jurisdiction over this dispute consistent with the decision.

(s)

David V. Breen, Arbitrator

Dated: 9/29/95

ARBITRATION AGREEMENT

Syncor International Corporation ("Employer") and David McLeland ("Employee") agree:

In the event (a) Employee disagrees with an Employer decision involving Employee's compensation, position or other conditions of employment or (b) if a dispute arises out of the separation from employment of Employee by Employer then first efforts to resolve the disagreement or dispute shall be according to the problem solving procedure in the Employer's Employee Handbook. If such disagreement or dispute is not resolved by such problem solving procedures, then it shall be resolved by binding arbitration, at the request of either party, in accordance with the rules of the American Arbitration Association. Such rules generally provide that the arbitration costs are split equally. For any proceedings, the arbitrator shall apply the law of the state in which the Employee is employed. The arbitrator shall have the power to award only actual direct compensatory damages which excludes punitive damages, and the parties waive the right to recover punitive damages. The arbitrator shall prepare in writing and provide to the parties an award including factual findings and the reasons on which the decision is based. The arbitrator shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected by judical review for any such error.

Notwithstanding the foregoing, in the event that Employee enters into a specific written Employment Agreement with Employer, the terms of such Employment Agreement shall prevail over the terms of this Arbitration Agreement TO the extent the terms of such Employment Agreement are in conflict with the terms of this Arbitration Agreement.

APPENDIX O

Employee's Signature David McLeland
Print Name David L. McLeland
Date 1/5/95 Witness (s)

AMERICAN ARBITRATION ASSOCIATION
419 Gateway Four, Pittsburgh, PA 15222-1207
Telephone: (412) 261-3617 • Fax (412) 261-6055

May 23, 1995
55-160-0073-95
Syncor International Corporation
and
David L. McLeland

RECEIVED
5/25/95

Thomas A. Heywood, Equire
Bowles, Rice, McDavid, Graff & Love
P. O. Box 1386
Charleston, WV 25325-1386

Robert E. Holroyd, Esquire
Johnston, Hoyroyd & Associates
1438 Main Street
Princeton, WV 24740

Dear Parties:

Claimant filed with this office a Demand for Arbitration of a controversy arising out of a contract between the above-named parties containing a clause providing for administration by this Association. We understand that a copy of the Demand was sent to the Respondent. A copy of the Arbitration Rules is enclosed.

The following numbered paragraphs contain important instructions concerning the administration of this arbitration. Please read each paragraph carefully and comply with the instructions.

APPENDIX P

1. ANSWER AND COUNTERCLAIM

The attention of Respondent is directed to Section 3 of the Rules. If Respondent does not answer within ten days of the date of this letter, we will assume that the claim is denied. If Respondent wishes to counterclaim, file four copies of such claim, together with the administrative fee, and send an additional copy of the counterclaim to Claimant.

2. TIME LIMITS

Certain time limits specified in the Rules are of short duration. Recent delays in the mails have made it difficult to comply with these short time limits. In view of this, it may be necessary for the AAA, in accordance with Section 27 of the Rules, to extend time limits for actions by the parties. You will be informed of any time limit established by the AAA.

3. ESTIMATED NUMBER OF HEARING DAYS

Enclosed is a pamphlet describing the authority of arbitrators to expedite lengthy or complex arbitration hearings. If you believe this case will require more than one hearing day, please review this pamphlet carefully before estimating hearing time.

4. LIST OF PROPOSED ARBITRATORS

Enclosed is a list of names from which a single arbitrator may be selected. The arbitrator will be selected in the following manner:

a. Striking From List of Arbitrators
Each party has the right to strike three (3) names and only three names, from the list. Names may be striken either peremptorily or for cause. Please list all remaining names in your order of

preference on the form provided and return the form to this office. If your arbitrator selections are not received by the AAA by the return date shown on the form, all proposed arbitrators will be deemed acceptable to you. If a mutually acceptable arbitrator cannot be appointed from the enclosed list, the AAA will proceed to an administrative appointment of the arbitrator.

b. Effect of Striking More than Three Names

Each party is allowed to strike only three names. If more than three names are stricken, all proposed arbitrators will be deemed acceptable to you.

If mutually acceptable arbitrators cannot be appointed from the enclosed list, the AAA will proceed to an administrative appointment of the arbitrator or arbitrators.

5. WITNESS LIST

Also enclosed is a confidential witness list. Please complete and return the witness list together with your arbitrator selections.

6. LOCALE

Claimant has requested that the hearing be held in Charleston, WV. Please review the Rules regarding the locale of hearings.

7. ADMINISTRATIVE FEES

AAA Administrative charges are based upon filing and service fees. Arbitrators compensation, if any, is not included. A service charge is made for each hearing day scheduled and for

each postponement. A processing fee is charged 180 days after a case is initiated and every 90 days thereafter until the case is withdrawn or the hearings are closed. Processing fees are payable regardless of the reason for the delay.

Delays associated with selection of arbitrators, or due to the inability of arbitrators to schedule hearings, will result in processing fee charges.

Please cooperate in the prompt processing of the arbitration to minimize processing fee charges. Please also carefully review the administrative fee portion of the enclosed rules.

8. MEDIATION

Mediation is a process by which a neutral person aids disputing parties in reaching a mutually acceptable resolution of their disputes. A mediator does not have authority to make a binding decision. Mediation need not delay a final and binding decision through Arbitration. Because mediation is less adversarial than arbitration, it may be possible to resolve the dispute more quickly and at lower cost to the parties. The Mediator will be compensated, but no additional administrative fees will be charged for the AAA's Mediation Services. AAA Mediation Rules are enclosed. Please contact the AAA if you wish more information regarding mediation.

Please include the above file number on all correspondence and exchange copies with the opposing party and the undersigned.

Very truly yours,
AMERICAN ARBITRATION ASSOCIATION
(s)
John F. Schano
Regional Vice President

JFS:cmd
Enclosures

INVENTION, SECRECY & OTHER MATTERS AGREEMENT

In consideration of my employment by Syncor International Corporation (which, separately and together with its affiliated companies will hereinafter be referred to as "Company") and the compensation paid to me by the Company, David McLeland (hereinafter referred to as "Employee") hereby agrees that:

1. All Employee's inventions, improvements and ideas (hereinafter referred to as "Assigned Inventions," whether or not patentable) which employee has conceived or worked on or may conceive or work on (either solely or jointly with others):

   a) during the period of his employment by the Company and relating to the business of the Company or

   b) during the period of three months thereafter and relating to the business of the company about which Employee acquired knowledge as a result of his employment by the Company.

shall be the exclusive property of the Company.

Employee shall keep and promptly and fully disclose to the Company complete and up-to-date written records (including drawings and photographs) of all Assigned Inventions. All Inventions, Improvements and Ideas conceived or worked on by Employee before Employee's employment by Company and owned by Employee are described on the list attached hereto as Exhibit A. (If there are no such inventions, improvements or ideas, write "none" here none.)

APPENDIX Q

2. Employee shall assign and does hereby assign to the Company all of Employee's interest in the Assigned Inventions and any letters patent or application for Letters patent thereon for all countries. Employee further agrees, at the expense and request of the Company but without further compensation to Employee, to do all lawful things and to execute and deliver to the Company all papers which in the opinion of the Company may be necessary to obtain or maintain said Assigned Inventions or Letters Patent or application therefor or to obtain or maintain title thereto in the company. In the event the company is unable to for any reason to secure Employee's signature on such papers, Employee hereby irrevocably appoints the Company and its duly authorized officers and agents as Employee's agent and attorney in fact to execute such papers and to do such things with the same legal force as if executed or done by Employee.

3. Employee shall keep in strict Confidence at all times (that is, not disclose to any unauthorized party and not make any unauthorized use of) all Company information acquired by Employee in connection with or as a result of Employee's employment by the Company which information is (a) identified by the Company as proprietary or (b) from the circumstances involved, in good faith ought to be treated as proprietary information of the Company. On the other hand, Employee shall not disclose to the Company, or induce the Company to use (or cause others to do either) any information which to the best of Employee's knowledge is another party's

proprietary information.

4. All written information and other items including, but not limited to, notes, data, sketches, manuals, drawings, notebooks, records, products, tools and fixtures relating to the business of the Company made or obtained by Employee while employed by the Company shall be the exclusive property of the Company and shall be delivered by Employee to the company (a) on termination of Employee's employment by the Company of (b) at any time as requested by the Company. Employee understands that the phrase "business of the Company" as used hereinbefore and hereinafter includes not only the design, development, manufacture and sale of the Company's products and the performance of the Company's services but also financial data, plans, reports and other Company information.

Employee acknowledges that all information released or available to Employee by reason of his employment with the Company concerning the Company's electronic data processing (EDP) systems is confidential and proprietary within the meaning of this Invention and Secrecy Agreement. Said information includes, without limitation, that concerning hardware, software, documentation and output. All EDP documentation, regardless of storage media, including all output and EDP forms, if covered by this paragraph 4 and may not be removed from the Company premises.

5. During the period of Employee's employment by

the Company, Employee shall not either directly or indirectly, (a) compete or set up to compete with the company in the business of the Company or (b) aid or become associated with others involved in such competition.

6. Employee understands that the names, addresses, requirements and preferences of customers and suppliers of the Company or proprietary information of the Company to the extent that they are not widely and publicly known. Employee shall not, either directly or indirectly, make any unauthorized use or disclose to any unauthorized party such proprietary information with which Employee becomes acquainted during his employment by the Company. During the period of two (2) years immediately after the termination of his employment with the Company, Employee shall not, directly or indirectly, either on Employee's behalf or for any other party, use such proprietary information to solicit, divert or otherwise attempt to take away any of the customers or suppliers of the Company.

7. Employee hereby irrevocably grants to the Company, its affiliated companies, successors, assigns and those acting on it behalf the right and authority to create, copyright, use, broadcast and publish for art, advertising, trade or any other purpose whatsoever any photograph or other recorded depiction of Employee's image caused to be produced by them in connection with employment of Employee by the Company, regardless of whether Employee by intentionally or

unintentionally depicted therein in whole or in part or in composite, in distorted character or form, in conjunction with is own or a fictitious name, or his own or a dubbed voice. Employee waives any right he might now or hereafter have to inspect the finished product or associated copy. The aforesaid grantees are hereby forever released and discharged from any liability to Employee for defamation, invasion of privacy, misuse of property or other causes of action arising out of said use of his image.

8. Employee agrees during the two (2) years after termination not to attempt, directly or indirectly, to entice Employer's other employees to leave Employer or breach any agreement they have with Employer.

9. If any legal action under this Agreement or by reason of any asserted breach of it, the Company shall be entitled to recover all costs and expenses, including reasonable attorney's fees, incurred in enforcing or attempting to enforce any of the terms, covenants, or conditions, including costs incurred prior to commencement of legal action, and all costs and expenses, including reasonable attorney's fees, incurred in any appeal from an action brought to enforce any of the terms, covenants, or conditions.

10. All clauses of this Agreement are distinct and severable. If any clause of this Agreement shall be held void, it shall not affect the validity of the remaining portions of this Agreement.

I ACKNOWLEDGE THAT I HAVE READ,

UNDERSTAND AND AGREE TO THE FOREGOING AGREEMENT.

DATED this 5 day of January, 1995.

at Memphis, TN .

David McLeland (s)

EMPLOYEE WITNESS

AGREEMENT AND RELEASE

For the sole consideration listed herein, the sufficiency of which is hereby acknowledged, David McLeland ("Employee") hereby (1) agrees to do nothing to impair the goodwill of Syncor with its customers, employees and shareholders, (2) agrees to answer questions relating to matters in which he was involved while an employee of Syncor, (3) to testify in any litigation relating to matters in which he was involved while employed by Syncor provided Syncor reimburses him for reasonable expenses incurred in connection with such testimony, and (4) releases Syncor, its employees and agents from any and all claims arising from his position elimination from Syncor. Employee's last day of work will be December 31, 1994.

As consideration for this release, Syncor agrees (1) to pay Employee an additional twelve (12) weeks severance pay; and (2) not to oppose employee's application for unemployment benefits.

If applicable, Employee's participation in ESSOP will cease as of last day of work, December 31, 1994, in accordance with plan rules.

Employee hereby declares that the terms of this Agreement have been completely read and fully understood and are voluntarily accepted for the purpose of making a full and final compromise of all claims on account of the above-mentioned position elimination and for the express purpose of precluding any further or additional claims relating to same.

Understood and agreed to this 6th day of December, 1994.
(s) Dave McLeland

SYNCOR MANAGEMENT CORPORATION
By: (s) Sharon Green
Title: Supervisor, Human Resources

APPENDIX R

machine, mobile phone, two printers, VGA monitor, & use of

JOHNSTON, HOLROYD & ASSOCIATES
Attorneys at Law
1438 Main Street
Princeton, West Virginia 24740

June 7, 1995

Mr. John F. Schano, Regional Vice President
AMERICAN ARBITRATION ASSOCIATES
419 Gateway Four
Pittsburgh, Pennsylvania 15222-1207

RE: 55-160-0073-95
SYNCOR INTERNATIONAL CORPORATION and DAVID L. McLELAND

Dear Mr. Schano:

On behalf of David McLeland, we do not submit to arbitration and have not agreed to arbitration. The contract recited by Syncor International Corporation was breached by it and the relationship between the parties is through and over with. There is nothing to arbitrate.

We have been attempting to negotiate some peaceful settlement between these parties in lieu of litigation but have been unable to do so. To invoke a provision in a former contract calling for arbitration and attempting to force my client and myself to travel to Charleston, West Virginia for Arbitration Hearings when all of the evidence and witnesses are either in California or in around Princeton, West Virginia seems likewise to be a stretch.

I am sorry that your Association has been put to the

inconvenience that it has been put to but it is not of our doing.

Very truly yours,

(s)
ROBERT E. HOLROYD
REH/faw

cc: Thomas A. Heywood

EXCERPTS FROM AMERICAN ARBITRATION ASSOCIATION EMPLOYMENT DISPUTE RESOLUTION RULES AS AMENDED AND EFFECTIVE ON 11/1/93

9. Number and Appointment of Neutral Arbitrators

If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA in its discretion, directs that a greater number of arbitrators be appointed.

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner: immediately after the filing of the demand or submission, the AAA shall send simultaneously to each party to the dispute an identical list of names of persons chosen from the panel.

Each party to the dispute shall have 10 days form the transmittal date in which to strike any names objected to, number the remaining names in order of preference, and return the list to the AAA. In a single-arbitrator case, each party may strike three names on a peremptory basis. In a multiarbitrator case, each party may strike five names on a peremptory basis. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from

among other members of the panel without the submission of additional lists.

***

18. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a p arty. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of the award.

97-901

No. _____

Supreme Court, U.S.
FILED
JAN 14 1998
OFFICE OF THE CLERK

In The Supreme Court of the United States

OCTOBER TERM 1997

DAVID L. MCLELAND,

Petitioner,

v.

SYNCOR INTERNATIONAL CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BENJAMIN L. BAILEY
RONDA L. HARVEY
Counsel of Record
BOWLES RICE McDAVID GRAFF & LOVE, P.L.L.C.
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325-1386
(304) 347-1100

Counsel for Respondent

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

53 pp

RESTATEMENT OF QUESTIONS PRESENTED

Whether the Courts below properly construed an arbitration agreement and ordered enforcement of an arbitrator's decision which was rendered ex parte, after notice to petitioner?

TABLE OF CONTENTS

RESTATEMENT OF QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 2

A. Basis of Jurisdiction In the First Instance and Procedural History 2

STATEMENT OF THE FACTS 5

REASONS FOR DENYING THE PETITION 12

I. The Petition raises no new legal issues and conflicts with the strong, clear federal policy favoring arbitration. 12

II. The *ex parte* Arbitration was Proper and McLeland has Offered No Valid Basis for Overturning the Award. 14

A. This Case Presents No Conflict of Any Issue Among the Circuit Courts ... 15

B. The Arbitrator was Neutral, and was Selected Solely by AAA with No Input from Syncor. 20

III. The Lower Courts Properly Decided that the Matter was Arbitrable, and the Timing of that Decision in this Case is Irrelevant 23

CONCLUSION 27

TABLE OF AUTHORITIES

STATUTES

28 U.S.C. § 1254(1), 2101(c) 1

CASES

Aronson v. Dean Witter Reynolds, Inc., 675 F.Supp. 1324 (S.D.Fla. 1987) 25

AT&T Technologies, Inc. v. Communications Workers of America, 106 S.Ct. 1415, 475 U.S. 643 (1986) 25

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221, 105 S.Ct. 1238, 1242, 84 L.Ed.2d 158 (1985) 12

First Options of Chicago, Inc. v. Kaplan, 115 S.Ct. 1920, 1921 (1995) 24

Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195 (4th Cir. (W.D.N.C.) 1990) 25

Peoples Sec. Life Ins. v. Monumental Life Ins. Co., 867 F.2d 809 (4th Cir. (Md.) 1989) 12

Remmey v. PaineWebber, Inc., 32 F.3d 143, 146 (4th Cir. (N.C.) 1994) 13

Richmond, Fredericksburg and Potomac R. Co. v. Transportation Communications Int'l Union 1992, 973 F.2d 276 (4th Cir. (Va.) 1992) 13

Sam Kane Packing Co. v. Amalgamated Meat Cutters, 477 F.2d 1128 (5th Cir. (S.D.Tex.) 1973) *cert. denied*, 414 U.S. 1001 (1973) 17-19

Shearson/American Express, Inc. v. McMahon, 107 S.Ct. 2332, 482 U.S. 220 (1987) 25

Sheet Metal Workers International Association Local Union v. Power City Plumbing & Heating, Inc., 934 F.2d 557 (4th Cir. (N.D.W.Va.) 1991) 15, 17, 19

Toyota of Berkeley v. Automobile Salesman's Union, Local 1095, 834 F.2d 751 (9th Cir. (N.D.Calf.) 1987) 16, 17, 19, 24

OPINIONS BELOW

On March 29, 1995, the United States District Court for the Southern District of West Virginia granted the Motion of Syncor International Corporation ("Syncor") to Enforce the Final Award of Arbitrator, David V. Breen. Petitioner David L. McLeland ("McLeland") filed a Motion for a New Trial which the District Court denied on August 19, 1996. McLeland appealed to the Fourth Circuit Court of Appeals, and the Fourth Circuit affirmed the District Court's Order.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on August 11, 1997. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1), 2101(c).

STATEMENT OF THE CASE

A. Basis of Jurisdiction In the First Instance and Procedural History

This case arises out of dispute between David L. McLeland ("McLeland") and his employer, Syncor International Corporation ("Syncor"). On May 18, 1995, Syncor submitted an arbitration demand to the American Arbitration Association ("AAA"), in accordance with the terms of an Arbitration Agreement voluntarily entered into by McLeland with Syncor. On July 12, 1995, the AAA scheduled the arbitration to take place in Charleston, West Virginia on August 21, 1995, and duly notified both parties. Respondent's Appendix A; Petitioner's Appendix D at D-7; Petitioner's Appendix M at M-11; Respondent's Appendix B at B-7.

Upon the advice of his first attorney and the theory that the dispute was not arbitrable, McLeland decided not to appear at the arbitration. Petitioner's Appendix E at E-4; Respondent's Appendix B at B-3 through B-4. Invoking the Federal

Arbitration Act, 9 U.S.C. 1, et seq., Syncor filed a Complaint and Petition to Compel Arbitration on August 2, 1995 seeking a hearing within five (5) days. When the District Court was unable to hear Syncor's Petition before August 21, 1995, the arbitration proceeded *ex parte* as provided for in the AAA rules which specifically governed the Arbitration Agreement. McLeland's answer to the original Complaint was filed two days later, on August 23.

The arbitrator issued his lengthy written Arbitrator's Final Award Including Factual Findings and the Reason on Which the Decision is Based on September 29, 1995. He found that McLeland had violated several agreements entered into with Syncor and awarded Syncor damages including, among other things, 100% of the stock in Princeton Diagnostic Isotopes, Inc. ("PDI"). Petitioner's Appendix M at M-1 through M-18. On October 17, 1995, Syncor filed in the case before the District Court a Motion to Enforce Arbitrator's Final Award.

On March 12, 1996, the District Court conducted a hearing on the Motion, and McLeland testified. On March 29, 1996, the District Court entered an Order granting Syncor's Motion to Enforce the Arbitrator's Award.

McLeland then terminated his relationship with his original lawyer and retained his present counsel. On April 8, 1996, McLeland moved for a new trial and to set aside Syncor's judgment. On April 25, 1996, Syncor filed a response. Meanwhile, on April 15, 1996, Jeffrey Clanton, McLeland's alleged partner, filed a motion to join him as an indispensable party. On May 2, 1996, Syncor filed its response to Mr. Clanton's motion. On August 19, 1996, the District Court entered an Order denying both motions and upholding its previous Order enforcing the Arbitrator's Award.

On September 13, 1996, McLeland appealed the District Court's decision to the United States Circuit Court of Appeals for the Fourth Circuit. Arguments were held on June 4, 1997,

and on August 11, 1997 the Fourth Circuit affirmed the District Court's order in an unpublished *per curiam* opinion.

STATEMENT OF THE FACTS

McLeland was employed with Syncor in various positions for more than ten (10) years. By 1994, he had advanced to the position of regional pharmacy manager of between five and ten Syncor pharmacies that generated annual revenue of between ten and twenty-five million dollars. Respondent's Appendix B at B-4 through B-6. During the course of his employment, McLeland executed various employment agreements with Syncor. The agreement which is the primary subject of this appeal is a 1995 Arbitration Agreement (the "Arbitration Agreement") in which McLeland and Syncor agreed to binding arbitration, according to AAA rules, of disputes arising out of separation from employment. Petitioner's Appendix O at O-1 through O-2. McLeland voluntarily entered into the Arbitration Agreement, and had no

concerns or misgivings about entering into it. Respondent's Appendix B at B-9 through B-10.

Other agreements between Syncor and McLeland included a 1993 Employment Agreement (the "Employment Agreement"). Petitioner's Appendix K at K-1 through K-4 and Petitioner's Appendix L at L-1 through L-5. McLeland also signed similar 1990 and 1995 Invention, Secrecy and Other Matters Agreements (the "Secrecy Agreement"). Petitioner's Appendix Q at Q-1 through Q-6 . The Employment Agreement prohibited McLeland from, among other things (i) enticing other employees to leave Syncor and (ii) competing against Syncor for a period of ninety (90) days following the termination of his employment. Petitioner's Exhibit K at K-1. The Employment Agreement also created an irrevocable Consulting Agreement Option during the term of the agreement and for 90 days thereafter, and also provided for injunctive relief and attorney's fees as remedies for any dispute

thereunder. Petitioner's Appendix K at K-3 through K-4; Petitioner's Appendix L at L-1 through L-5. McLeland admitted in open court that he voluntarily agreed to the restrictive covenant against competition and to the provisions regarding injunctive relief. Respondent's Appendix B at B-9 through B-10. The Secrecy Agreement contained similar provisions, and specifically prohibited McLeland from directly or indirectly using propriety information to solicit, divert or otherwise attempt to take away any of Syncor's customers. Petitioner's Appendix Q.

In a letter dated November 28, 1994, Syncor informed McLeland that, for business reasons, it was necessary for Syncor to eliminate his position effective December 31, 1994. Respondent's Appendix C. Pursuant to company policy, McLeland received 10 weeks severance pay. Respondent's Appendix C. McLeland also received an additional 12 weeks of severance pay in exchange for signing an Agreement and

Release, releasing Syncor from any claims arising from his separation of employment. Respondent's Appendix C; Petitioner's Appendix R at R-1 through R-2. On January 5, 1995, McLeland was rehired by Syncor as a temporary pharmacist. Petitioner's Appendix Q at Q-1 through Q-6. At that time, he voluntarily signed the Arbitration Agreement. In March of 1995, his employment as a temporary pharmacist was terminated. Respondent's Appendix D.

Sometime in October or November 1994, on the eve of the coming termination, McLeland began planning and pursuing establishing a nuclear pharmacy in the Beckley/Princeton area which he hoped to operate as a joint venture with Syncor. Petitioner's Appendix M at M-4 through M-5. In November, 1994, Syncor rejected McLeland's idea. Petitioner's Appendix M at M-8 through M-9. Although McLeland was aware of Syncor's disapproval, he convinced Wade Hopkins, another Syncor employee, to help him establish

the pharmacy, and Hopkins paid McLeland $20,000.00 for 50% of its stock. Respondent's Appendix E; Petitioner's Appendix M at M-4 through M-5. In violation of the Secrecy Agreement and Employment Agreement, McLeland incorporated the pharmacy as Princeton Diagnostic Isotopes, Inc. on January 31, 1995. Petitioner's Appendix M at M-4 through M-5.

Without appropriate approval from Syncor, McLeland also began soliciting Syncor's customers including two (2) key customers located in Raleigh County, West Virginia -- Raleigh General Hospital and Beckley Hospital. Petitioner's Appendix M at M-5. At that time, the Beckley Hospital contract was worth approximately $10,000 per month and the Raleigh General Hospital contract was worth approximately $23,000 per month. Petitioner's Appendix M at M-5. These customers represented about 45% of the business of Syncor's Huntington, West Virginia pharmacy. Petitioner's Appendix M at M-5.

In January or February 1995, after McLeland's plans for establishing a joint venture with Syncor had failed, Syncor became aware of these efforts to establish a competing pharmacy. Petitioner's Appendix M at M-11. In February 1995, Mr. Haig Bagerdjian, Syncor's general counsel, contacted McLeland regarding his activities. Petitioner's Appendix M at M-11. McLeland immediately attempted to negotiate a deal with Syncor to sell all or part of PDI to Syncor. Petitioner's Appendix M at M-11. Despite Syncor's efforts to resolve this matter, the parties could not come to terms. Petitioner's Appendix M at M-11.

On March 30, 1995, after these negotiations failed, Syncor wrote McLeland to notify him that it intended to exercise its option under the 1993 Employment Agreement, to engage him as a consultant. McLeland refused to sign the consulting agreement, and this dispute began in earnest, as set forth in the procedural history in Section A, above.

Meanwhile, Syncor purchased Hopkins' 50% interest in PDI. Petitioner's Appendix M at M-11. However, McLeland refused to transfer the stock certificates, claiming that the stock was subject to a buy-sell agreement in favor of McLeland. Petitioner's Appendix M at M-11. Hopkins never entered into any such buy-sell agreement. Petitioner's Appendix M at M-11.

On August 21, 1995, as set forth in the procedural history above, Syncor arbitrated this matter *ex parte*. The arbitrator found that McLeland's activities violated the 1993 Employment Agreement and the 1995 Secrecy Agreement. Petitioner's Appendix M at M-18. Pursuant to those agreements, the arbitrator awarded Syncor 100% of the stock in PDI, ordered McLeland to cease and desist from soliciting or selling to Syncor's customers, and ordered McLeland to cease and desist from further violating the Agreements. Petitioner's Appendix M at M-11; Petitioner's Appendix N at N-1 through

N-3. It is this award, as enforced by both Courts below, which McLeland seeks to avoid.

REASONS FOR DENYING THE PETITION

I. The Petition raises no new legal issues and conflicts with the strong, clear federal policy favoring arbitration.

This Court has directed federal courts to "rigorously enforce agreements to arbitrate." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221, 105 S.Ct. 1238, 1242, 84 L.Ed.2d 158 (1985). The heavy presumption favoring arbitration is based on the need for speedy and efficient decisions. Peoples Sec. Life Ins. v. Monumental Life Ins. Co., 867 F.2d 809 (4th Cir. (Md.) 1989). Arbitration cases tend by their nature, to be fact-specific and to turn on the specific language of the arbitration agreement at issue. This case fits this model. Accordingly, nothing in this case presents the sort of novel or critical legal issue which would warrant granting the Petition.

Syncor obtained the arbitrator's detailed decision in its favor on September 29, 1995. Petitioner's Appendix M at M-1 through M-8. That should have been the final word. McLeland voluntarily entered into the Arbitration Agreement, and Syncor had every reason to expect that arbitration would resolve its dispute with McLeland. The result, however, has been unnecessary, unwarranted and seemingly unending litigation. By trying time and time again to avoid his legal obligations, McLeland has spurned the federal policy favoring arbitration.

These efforts to change the outcome of an arbitration are disfavored: "Parties may not seek a 'second bite at the apple' simply because they desire a different outcome. 'To permit such attempt would transform a binding process into a purely advisory one.'" Remmey v. PaineWebber, Inc., 32 F.3d 143, 146 (4th Cir. (N.C.) 1994), *citing* Richmond, Fredericksburg and Potomac R. Co. v. Transportation Communications Int'l Union 1992, 973 F.2d 276 (4th Cir. (Va.) 1992). In the spirit

of the strong and clear federal policy favoring arbitration and for the other reasons set forth below, the Supreme Court should deny McLeland's petition.

II. The *ex parte* Arbitration was Proper and McLeland has Offered No Valid Basis for Overturning the Award.

The Arbitration Agreement is governed explicitly by the AAA rules. As both the District Court and the Fourth Circuit concluded, the AAA "rules provide for an arbitration hearing to proceed *ex parte* if a party who has received proper notice does not participate in the hearing." Memorandum Opinion; Petitioner's Appendix B at B-5; Appellate Opinion; Petitioner's Appendix A at A-6.

McLeland claims that the *ex parte* arbitration was improper because, in his view, the AAA rules require joint selection of the arbitrator. Since McLeland did not participate in the selection of the arbitrator, he contends that the arbitration proceeded in violation of the AAA rules. He further asserts that

the Fourth Circuit's ruling in this case conflicts with the Fifth and Ninth Circuits regarding the issue of arbitration enforcement when the arbitrator was not selected in accordance with the Arbitration Agreement. Petitioner's argument is flawed both legally and factually. First, the Fourth, Fifth and Ninth Circuits are not in conflict over this issue. Second, contrary to Petitioner's assertion, the Arbitrator in this case was selected in accordance with AAA rules.

A. This Case Presents No Conflict of Any Issue Among the Circuit Courts.

McLeland asserts that the Fourth Circuit's holding in this case and in Sheet Metal Workers International Association Local Union v. Power City Plumbing & Heating, Inc., 934 F.2d 557 (4th Cir. (N.D.W.Va.) 1991), that "if the opposing party was served with proper notice and was aware of the arbitration proceedings, '[t]he arbitration award is valid and fully enforceable despite [that party's] absence,'" conflicts with decisions rendered by the Fifth Circuit and Ninth Circuit.

Specifically, McLeland claims that this holding is contrary to the Ninth Circuit's holding in Toyota of Berkeley v. Automobile Salesman's Union, Local 1095, 834 F.2d 751 (9th Cir. (N.D.Calf.) 1987). Toyota of Berkeley and the Automobile Salesman's Union were parties to the collective bargaining agreement. The Union submitted a grievance to Toyota after Toyota discharged an automobile salesman. Several months later the Union submitted a formal demand for arbitration. The parties agreed on an arbitrator and an arbitration was scheduled, but Toyota decided it would not participate in the arbitration because it claimed the Union failed to comply with procedural requirements. The Court in Toyota of Berkeley, construing the agreement in that case, stated:

> If an agreement provides that the parties shall jointly select an arbitrator, however, the Court **may** refuse to enforce an award made following an *ex parte* hearing before an arbitrator selected without the defaulting party's cooperation on the grounds that the party not in default should have sued to compel arbitration.

Id. at 754 [emphasis added]. Since the parties had agreed on an arbitrator before the arbitration, the Ninth Circuit's statement was merely dicta, and the arbitration agreement in that case differed from the one at issue in this Petition. Nevertheless, the Ninth Circuit did not require a court to refuse to enforce an award when join selection is mandated, but not followed. Rather, the Ninth Circuit gave the court discretion to enforce such an award. Thus, Toyota of Berkeley does not conflict with the Fourth Circuit's decision in Power City and the present case.

Likewise, Power City and the present case do not conflict with the Fifth Circuit's decision in Sam Kane Packing Co. v. Amalgamated Meat Cutters, 477 F.2d 1128 (5th Cir. (S.D.Tex.) 1973) *cert. denied*, 414 U.S. 1001 (1973). Although the facts in Sam Kane are different from the present case, the holding again supports enforcement of Syncor's arbitration award.

Sam Kane involved a collective bargaining agreement that allowed each party to nominate a representative with the representative of each party jointly selecting a third arbitrator. The collective bargaining agreement provided that if one party did not participate in the arbitration, the representative appointed by the single party would arbitrate the grievance and his decision would bind both parties. The Fifth Circuit held that this clause would be construed strictly to apply only where a party failed to name a representative to the arbitration board. Hence, this clause did not apply because Sam Kane Packing Company named an arbitrator who refused to participate on the grounds that the case was not arbitrable. The *ex parte* arbitration failed to comply with the collective bargaining agreement, and thus was not enforceable.

In this case, Syncor proceeded to arbitrate this matter in full compliance with its Arbitration Agreement. The collective bargaining agreement in Sam Kane contained requirements that

were not present in the arbitration agreements in the present case, in Power City, or Toyota of Berkeley. Thus, Sam Kane does not conflict with the Fourth or Ninth Circuit decisions.

In fact, the Fifth Circuit's ruling actually supports the district court's enforcement of the arbitration award in this case. In Sam Kane, the Fifth Circuit "note[d] that had there been a method whereby an admittedly 'neutral' arbitrator was selected and the company merely refused to participate in the hearing we would be faced with a strong case for the award." 477 F2d. at 1136. Contrary to McLeland's assertions, as discussed below, a neutral arbitrator was selected by the AAA, in accordance with its rules, in the present case. Thus, the Fifth Circuit's dicta in Sam Kane is in accordance with the Fourth Circuit's rulings in Power City and the present case.

B. The Arbitrator was Neutral, and was Selected Solely by AAA with No Input from Syncor.

McLeland attempts to paint a picture of unfairness on the basis that he failed to participate in the selection of the arbitrator. Furthermore, he claims that joint selection of the arbitrator is required by the AAA rules. McLeland's argument is factually flawed. First, as the District Court and Fourth Circuit concluded, the AAA rules merely provide for "joint input" and do not require joint selection. Secondly, and perhaps more importantly, the arbitrator was selected completely by the AAA with no input from Syncor.

The AAA Rules provide for the AAA to send each party, simultaneously, a list of arbitrators for the parties to review and make their objections and strikes, if any. These rules were followed On May 23, 1995, AAA mailed each party a list of proposed arbitrators and allowed each party to strike three names from the list. AAA further allowed the parties to

list all remaining names in the order of preference on a form provided by AAA. Syncor did not strike any names, and did not list the arbitrators in any preferential order. Rather, Syncor responded that it had no preference. See, Respondent's Appendix F.

McLeland had his chance to participate in selecting an arbitrator, but declined. So, the AAA proceeded to select the arbitrator and schedule the arbitration. McLeland never expressed any concern with the selection process in his Answer (filed two days after the arbitration hearing) or in any District Court brief. Nor did he testify regarding such concerns during the hearing on Syncor's Motion to Enforce the Arbitrator's Award. In fact, he never filed a brief with the arbitrator; and never raised any objection to the selection process until he appealed to the Fourth Circuit. If he had, the record would be clearer.

McLeland complains about being deprived of his strikes, but he has never made any claim that the arbitrator was biased, and he has never objected to the choice of the arbitrator. By his own admission, he was not prejudiced by his failure to participate in the selection of the arbitrator. As the Fourth Circuit found, the AAA rules provide only for joint input, not joint selection. Since the AAA rules also recognize the validity of an *ex parte* arbitration, the Fourth Circuit properly concluded that the selection of the arbitrator and the arbitration proceeding itself were both valid despite McLeland's failure to participate.

III. The Lower Courts Properly Decided that the Matter was Arbitrable, and the Timing of that Decision in this Case is Irrelevant.

The District Court thoroughly analyzed the issue of arbitrability, using the language of the Arbitration Agreement, the Court found that the dispute was related "to the separation of respondent from his employment with Syncor" (Petitioner Appendix B at B-8); and concluded that the case was arbitrable. The Fourth Circuit upheld that decision, and no basis exists for revisiting it.

McLeland also claims, however, that the arbitration should not have proceeded without an order from the Court on the issue of arbitrability before the arbitration took place. As a matter of law and policy, this claim should be rejected. The issue of arbitrability, in every arbitration, is a distinct issue which courts wills always review; the purposes of arbitration would be foiled in this case if arbitrability had to be decided, by a court, before arbitration commenced.

Cases cited by McLeland actually contradict his assertion. In First Options of Chicago, Inc. v. Kaplan, 115 S.Ct. 1920, 1921 (1995), the Supreme Court held that if the parties agreed to submit the question of arbitrability to the arbitrator, "then the court should defer to the arbitrator's arbitrability decision. If not, then the court should decide the question independently." Because the issue is independent, it can be decided either before or after the arbitration itself. In First Options, this Court seemed to anticipate that the arbitration could take place ***before*** the court determines the issue of arbitrability, to enable the reviewing court to "defer to the arbitrator's arbitrability decision."

Likewise, in Toyota of Berkeley, the Court decided the issue of arbitrability ***after*** the arbitration occurred. Thus, although arbitrability is a question for the court, it is implicit in Toyota of Berkeley's decision that a court may resolve the issue ***after*** the arbitration.

Allowing courts to rule on arbitrability after a matter is arbitrated is also in accordance with the strong federal policy favoring arbitration. See AT&T Technologies, Inc. v. Communications Workers of America, 106 S.Ct. 1415, 475 U.S. 643 (1986) (doubts concerning arbitrability should be resolved in favor of arbitration). Based on the policy favoring arbitration, courts have placed the burden of proving a matter is not arbitrable on the party contesting arbitrability. See generally, Shearson/American Express, Inc. v. McMahon, 107 S.Ct. 2332, 482 U.S. 220 (1987); Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195 (4th Cir. (W.D.N.C.) 1990); Aronson v. Dean Witter Reynolds, Inc., 675 F.Supp. 1324 (S.D.Fla. 1987).

The burden was on McLeland to prove that the matter was not arbitrable. Tut nothing in the Arbitration Agreement supports his argument that arbitrability had to be decided by a court before the arbitration could begin. Since McLeland did

not even attempt to meet that burden prior to the arbitration, which he could have done by replying promptly to the original complaint filed by Syncor (See District Court Order, footnote 2, Petitioner's Appendix B at B-6, 7) the facts of this case and the federal policy supporting arbitration support the district court's resolution of the arbitrability issue after the arbitration.

CONCLUSION

The Court should deny McLeland's petition. The petition presents no conflict among the Circuits. Moreover, the District Court properly determined that the case was arbitrable, and properly enforced the arbitration award.

Respectfully submitted,

BENJAMIN L. BAILEY
RONDA L. HARVEY
BOWLES RICE McDAVID
GRAFF & LOVE, P.L.L.C.
600 Quarrier Street
P. O. Box 1386
Charleston, WV 25325-1386

CHS136017

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A

American Arbitration Association Revised Notice of Hearing, dated July 12, 1995

Appendix B

Excerpts from Transcript of March 12, 1996 Hearing in United States District Court for the Southern District of West Virginia

Appendix C

Letter from Syncor International Corporation to David McLeland dated November 28, 1994

Appendix D

Letter from Syncor International Corporation to David McLeland dated March 30, 1995

Appendix E

Stock Subscription Assignment

Appendix F

Letter from Counsel for Syncor International Corporation to American Arbitration Association dated June 2, 1995

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between
Syncor International Corporation
AND
David L. McLeland
CASE NUMBER: 55-160-0073-95

REVISED NOTICE OF HEARING

Benjamin L. Bailey, Esquire
Thomas A. Heywood, Esquire
Bowles Rice McDavid Graff & Love
P. O. Box 1386
Charleston, WV 23523-1386

Robert E. Holroyd, Esq.
Johnston, Holroyd
& Associates
1438 Main Street
Princeton, WV 24740

Please Take Notice that a Hearing in the above-entitled Arbitration will be held at

AT: Holiday Inn Heart of Town
1000 Washington Street East
Charleston, WV 25301
DATE: August 21, 1995
TIME: 9:30 A.M.
BEFORE: David V. Breen, Esquire

Please attend promptly with your witness and be prepared to present your proofs.

Dated: July 12, 1995

Bonnie L. Clouse
Case Administrator

APPENDIX A

NOTICE: The Arbitrator(s) have arranged their schedule and reserved the above date to meet the convenience of the Parties. Therefore, every effort should be made to appear on the date scheduled. In the event that unforeseen circumstances make it impossible to attend the hearing as scheduled, the Parties are to request a postponement no less than 48 hours before the time and date set for hearing. All requests for postponements must be communicated to the Case Administrator (not the Arbitrator). There should be no communication between Parties and the Arbitrator other than at oral hearings.

NOTE: A CHARGE WILL BE MADE FOR POSTPONEMENT OF ANY HEARING.

PLEASE SEE RULES.

cc: David V. Breen, Esquire
Phylis Grandchamp -
Holiday Inn

Form 8-AAA-C-1/82

EXCERPTS FROM TRANSCRIPT OF MARCH 12, 1996 HEARING

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD

SYNCOR INTERNATIONAL CORPORATION, a Delaware corporation, Plaintiff, v. DAVID L. McLELAND, an individual, Defendant.	NO. 1:95-0565 DATE: March 12, 1996

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID A. FABER
UNITED STATES DISTRICT JUDGE
IN BLUEFIELD, WEST VIRGINIA

Court Reporter: Teresa L. Anderson, RDR
(304) 465-8132

Proceedings recorded by mechanical stenography;
transcript produced by computer.

APPENDIX B

A. It would have been sometime around the first or middle of March. I can't really remember --

Q. But it was after you finally severed employment?

A. Oh, it was after I was finished in Memphis, yes.

Q. In mid-February?

A. Correct.

Q. All right. When did you first learn that they were objecting to you operating your own shop?

A. I received a phone call from Mr. Bagerdjian at my home.

Q. Do you know when that was?

A. It would have been after the 15th of February. I can't remember for sure.

Q. All right. They called upon you to arbitrate this disagreement you were having with them; is that correct?

A. Correct.

Q. And why did you not arbitrate it with them?

A. Well, first off, I didn't feel that they could invoke the Consulting Agreement because they didn't give me 90 days notice. And, I guess, you know, the second opinion in my mind, the way I read the agreement, was that if I had a problem with the way they terminated me, then I had the course of going

to arbitration, but the main thing was they didn't give me 90 days notice before they terminated me, so that was what they were trying to get me to do, and since they didn't do that, I didn't feel it was necessary for me to spend my

* * * *

McLeland - Cross

Q. All right. So at least since 1990 you had worked for Syncor according to the terms of the Invention, Secrecy & Other Matters Agreement?

A. Right, and this one is different than the one I signed --

Q. In '95?

A. Correct. It's different, and it contains different language.

Q. Right. When you were a regional manager for Syncor, what were your responsibilities?

A. What were my responsibilities? My responsibilities were to oversee the operations of various pharmacies that were given to me to oversee.

Q. How many?

A. It varied; anywhere from five to ten.

Q. At different points in time?

A. Correct. They fluctuated, depending on how things were organized and reorganized.

Q. Okay. How many employees were --

A. How many direct? Well, I would have direct reports of the pharmacy managers of five to ten, but underneath those then there would be their reports to those people, so I would be responsible for all of those people.

Q. About how many would that have been, top to bottom?

A. Oh, I couldn't answer that. I mean, it could -- you know, it could be up to a hundred people, maybe, but I basically dealt with the pharmacy managers, and then it was their responsibility to -- you know, I would only have conversations with them if there were any difficulties with the pharmacy manager and them.

Q. What's the amount of revenues involved in those five to ten pharmacies?

A. It varied anywhere from ten to twenty-five million dollars.

Q. Ten to twenty-five million?

A. Correct.

Q. And that was under your supervision; right?

A. Correct.

Q. Did the company pay expenses -- or any expenses associated with your airplane?

A. My airplane?

Q. Uh-huh.

A. They basically reimbursed me. When I would fly somewhere, they would reimburse me for the time -- if it was cheaper for me to fly than be on a commercial airline, then they would reimburse me for that.

Q. Pay for the insurance?

A. No, they did not. They carried a separate policy for their own liability, but they didn't pay my insurance.

Q. Okay. They carried a separate policy that had to do with liability?

A. Yeah. They were afraid I would fall into a school bus,

* * * *

THE WITNESS: No, thank you.

BY MR. BAILEY:

Q. The name of the pharmacy that you owned stock in was Princeton Diagnostic Isotopes, Inc.; right?

A. Correct.

Q. You had counsel in setting that up; is that right?

A. Correct.

Q. And you were notified of Syncor's request for arbitration; right?

A. Correct.

Q. And declined to participate; right?

A. Correct.

Q. And you have reviewed the order of the arbitrator?

A. I've read it, yes.

MR. BAILEY: I don't have anything else, Your Honor. Thank you.

THE COURT: All right. Mr. Holroyd, Mr. Williams, do you have anything else?

MR. HOLROYD: May I have just a moment to confer, Your Honor?

THE COURT: Yes, you may.

REDIRECT EXAMINATION

BY MR. HOLROYD:

Q. You testified concerning some conversations you had with your supervisor about setting up this shop here in Princeton;

* * * *

MR. BAILEY: Sure, Judge.

THE COURT: Mr. McLeland, when you signed the Arbitration Agreement on the 5th of January, 1995, did you read it before you signed it?

THE WITNESS: Yeah.

THE COURT: Did you have any discussions with anybody at Syncor about whether you wanted the agreement in that form or another form or anything?

THE WITNESS: No, because, basically, you know, I had worked for them for twelve years and, you know, I had a good relationship with my supervisor, and, you know, I didn't see that -- you know, it was something that everybody signed so you could process your paperwork, so it was just going to slow stuff up, and the way I read it was if I had a problem with the way that I was terminated then I could use arbitration as a means to resolve it.

THE COURT: Did you have any concerns or misgivings at that time about entering into that Arbitration Agreement?

THE WITNESS: No, because my supervisors were helping me set the pharmacy up, and basically after the pharmacy was set up, I was going to go back and do relief work for them, so I didn't see it to be a problem, because everything was aboveboard, and there was nothing -- you know, as far as the inventions and secrecy, everybody was aware of what I was doing, so it wasn't a secret at that point in time, ...

* * * *

McLeland Cross

... from Huntington; it was going to be forty some miles for me. They told me that it would be okay for me to go in and speak with those customers and that the customer could decide what was best for them.

Q. Same customers?

A. Same customers.

Q. Raleigh General -- at least two hospitals here; right?

A. Raleigh General and Beckley. They gave me the authority -- they said that I could go in and talk to those people.

Q. You also agreed in that Invention, Secrecy and Other Matters Agreement not to attempt to entice other employees to leave or breach any agreement they had with them, didn't you?

A. That's correct.

Q. And do you recall, sir, that in your original employment agreement that it contained -- that in it you had agreed not to solicit other employees from Syncor for two years after termination?

A. That's correct.

Q. And you had agreed not to compete for 90 days?

A. That's correct.

Q. And you agreed to an injunction against any violations of it?

A. It that was in the agreement, I agreed to it.

Q. Mr. McLeland, you had --

THE COURT: Do you want some water?

* * * *

November 28, 1994

Mr. David McLeland
Operations Analyst

Dear David:

As the enclosed memo from the Officers explains, it has unfortunately become necessary to eliminate your position with Syncor for business reasons. It is with regret, therefore, that we must inform you that your last day of employment will be December 31, 1994.

The purpose of this letter is to outline your final compensation and severance benefits:

1. You will receive 10 weeks severance pay in accordance with the Company policy as stated in the Employee Handbook.

2. You will also be paid any accrued but unused vacation and floating holiday hours to which you would normally be entitled as of December 31, 1994.

3. If applicable, all normal deductions will be made from your final paycheck and you will be covered by the Flexible Benefits plan through the end of the month in which you terminate. The Benefits Department will send you the materials necessary to continue your medical insurance as outlined in the COBRA legislation directly to your home address within a couple of weeks following your last day worked. (COBRA legislation affords you the opportunity to continue medical, dental

and vision benefits at the Company's group rate, plus a 2% administrative charge. Normally, you can continue at this rate for up to 18 months.)

4. As a special consideration, and in light of the circumstances in this particular situation, if you return all Company property (if applicable) and choose to sign the enclosed "AGREEMENT AND RELEASE," you will receive additional severance pay for twelve (12) weeks.

Human Resources will be available to assist you in resume preparation. If you'd like this assistance, please see the enclosed flyer for details, or speak with me about it.

If you would like some time to review this Agreement, preferably with you attorney, please do so. In order to receive these additional benefits, Human Resources will need to receive your signed Agreement no later than January 14, 1995.

Also, because your position has been eliminated through no fault of your own, you will not be obligated to reimburse Syncor for the relocation assistance we gave you.

You will receive your regular severance, vacation, floating holiday and final work hours pay in a lump sum check by December 31, 1994. If you elect the special consideration severance pay, you will receive the additional lump sum within seven days after receipt of your signed Agreement, but no earlier than your last day. If you have any questions when you receive your final check(s) or you need assistance with anything else, please do not hesitate to contact me at extension 4459.

We have also included in this packet a pamphlet for US Behavioral Health, the Company's employee assistance program. This is a pre-paid benefit for you so please do not hesitate to contact them if you feel you need to use their counseling services. They will extend their services for you convenience until the end of December. Their toll-free number is included in this packet, so please contact them if you feel it would be helpful. Your call will be treated with strict confidence.

Sincerely,

Sharon Green
Human Resources

I hereby acknowledge receipt of this letter and understand that my signature only indicates receipt:

_____ _____

Employee Date

March 30, 1995

Mr. David L. McLeland
103 Karie
Sellersburg, IN 47172

Dear Mr. McLeland:

I am writing to inform you that Syncor hereby exercises its options to engage you as a consultant according to the Director/Manager Employment Agreement which you last signed on January 30, 1993, a copy of which is attached hereto. Pursuant to Syncor's exercise of this option, enclosed are duplicate originals of the Consulting Agreement for your signature. Please return one fully executed copy to me and retain one for your files. Syncor is also providing a copy of this letter and the Consulting Agreement to your attorney, Mr. Robert Holroyd, and has also informed Mr. Holroyd of its exercise of the option to engage you as a consultant.

Very truly yours,

Robert G. Funari
Executive Vice President and
Chief Operating Officer
cc: Robert E. Holroyd, Esq.

APPENDIX D

STOCK SUBSCRIPTION ASSIGNMENT

I, Randall L. Trautwein, do hereby assign to David McLeland, the right to subscribe to fifty (50) shares of capital stock, and to Wade Hopkins, the right to subscribe to fifty (50) shares of capital stock, of Princeton Diagnostic Isotopes, Inc., a West Virginia corporation, which subscription right arises from that certain stock subscription agreement dated February 1, 1995.

_____

Randall L. Trautwein

APPENDIX E

BOWLES RICE
MCDAVID GRAFF & LOVE
POST OFFICE BOX 1386
CHARLESTON, WEST VIRGINIA 25325-1386

June 2, 1995

347-1178

VIA FACSIMILE - (412) 261-6055

Cheri Bugajski, Case Administrator
American Arbitration Association
419 Gateway Four
Pittsburgh, Pennsylvania 15222-1207

Re: In the Matter of the Arbitration Between Syncor Corporation and David L. McLeland
Case Number: 55-160-0073-95

Dear Ms. Bugajski:

My law firm represents Syncor International in the above-referenced matter. We have no objection to any of the arbitrators whose names you previously sent us.

With this letter you will also find a list of potential witnesses, their affiliations and addresses, to the best of our knowledge. Please let us know if you have any questions.

APPENDIX F

Sincerely,

Benjamin L. Bailey

BLB:glc
Enclosure